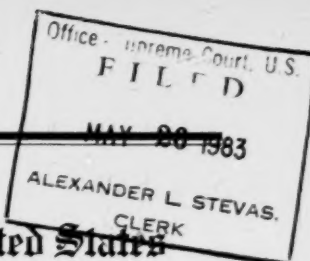


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No.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Western District of Texas

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

May the minimum wage and overtime provisions of the Fair Labor Standards Act constitutionally be applied to the employees of a publicly owned and operated mass transit system? *

* The parties to this action are Raymond J. Donovan, Secretary of Labor of the United States, and Joe G. Garcia, plaintiffs in the court below, and San Antonio Metropolitan Transit Authority, and the American Public Transit Association, defendants in the court below.

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On Appeal from the United States District Court
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas is reported at 557 F. Supp. 445 and is reproduced in the Appendix at pp. 1a to 18a, *infra*. The prior judgment of the District Court, reproduced at pp. 23a to 24a, *infra*, is not officially reported, but appears at 25 Wage and Hour Cases (BNA) 274.

JURISDICTION

The appellee, San Antonio Metropolitan Transit Authority ("SAMTA") instituted a declaratory judgment action against the Secretary of Labor, alleging that the minimum wage and overtime provisions of the Fair Labor

Standards Act of 1938 as amended, 29 U.S.C. §§ 201 *et seq.* ("FLSA") could not, by virtue of the Tenth Amendment, constitutionally be enforced against SAMTA. Subject matter jurisdiction was founded on 28 U.S.C. §§ 1331 & 1337.

The judgment of the District Court declaring that the Secretary of Labor may not constitutionally apply or seek to enforce the FLSA against SAMTA or any other local public mass transit system was entered on February 18, 1983 and effective as of February 14, 1983 (pp. 19a-21a, *infra*). Appellant filed a notice of appeal on March 16, 1983 (p. 22a). On April 25, 1983, Justice White entered an order extending the time for filing this Jurisdictional Statement to and including June 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252. See, e.g., *Donovan v. Richard County Assn.*, 454 U.S. 389.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Article I, § 8 of, and the Tenth Amendment to, the Constitution of the United States; and the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, etc., 29 U.S.C. §§ 201 *et seq.* These constitutional and statutory provisions are reproduced in the Appendix, pp. 25a to 27a, *infra*.

STATEMENT OF THE CASE

I. The Factual Background

Prior to May 1, 1959 public transportation in San Antonio was provided by the San Antonio Transit Company ("SATC"). On May 1, 1959 the City of San Antonio created the San Antonio Transit System ("SATS") and bought SATC. Appellee San Antonio Metropolitan Transit Authority ("SAMTA") became the successor to SATS on March 1, 1978.¹

¹ SAMTA is a regional transit authority created pursuant to Tex. Rev. Civ. Stat. Ann. Art. 1118x (Vernon Cum. Supp. 1981) to

During its first decade of operations, SATS had been a money-making venture whose operations were governed by the terms of a revenue bondholders' indenture.² However, in a statement prepared for delivery to the Subcommittee on Housing of the House Committee on Banking and Currency, on March 10, 1970, F. Norman Hill, general manager of SATS, advised that the system had experienced an operating loss for the first time in its history.³

Later that year SATS received a capital grant by the Urban Mass Transit Administration in the amount of \$4,122,666.⁴ Over the next 10 years SATS and its successor, SAMTA, received \$51,689,000 in federal capital and operational grants.

II. The Proceedings In This Case

In response to a specific inquiry about the applicability of the FLSA to employees of SAMTA, the Wage and

serve the San Antonio metropolitan area. The City Council of San Antonio created VIA Metropolitan Transit to do the business of the SAMTA on February 3, 1977. VIA purchased the facilities and equipment of SATS from the City of San Antonio as of March 1, 1978 and commenced operations on that date.

² The National Bank of Commerce of San Antonio, acting as the bondholders' trustee, was the depository for all of the system's revenues and would release monthly operating funds to the system in accordance with the annual budget. As of March 1, 1978, when SAMTA assumed transit operations, the bonds were paid in full.

³ Mr. Hill, was speaking on behalf of the American Transit Association in support of H.R. 1626. That bill (see, 116 Cong. Rec. 5785 (1970)) was one of several introduced that session "to provide long-term financing for expanded urban mass transportation programs, and for other purposes." Compare the preamble to the Urban Mass Transportation Act of 1970, P.L. 91-453, which, in part, amended the Urban Mass Transportation Act of 1964, P.L. 88-365, 49 U.S.C. § 1601 *et seq.* The significance of that Act for this case is discussed at pp. 8-12, *infra*.

⁴ Project No. TX03005, approved December 23, 1970.

Hour Administration of the Department of Labor rendered an opinion "that the operations of the San Antonio Transit System are not constitutionally immune from the application of the Fair Labor Standards Act." (Opinion WII-499, dated September 17, 1979, reprinted in Wage Hour Manual (BNA) 91:1138-1140). (See also § 775.3(b) of the FLSA regulations (Code of Federal Regulations, Title 29, Part 775), which includes "local mass transit systems" as one of a list of "functions of a State or its political subdivision [that] are not traditional." (44 Fed. Reg. 75628.))

On November 21, 1979, SAMTA filed this action for declaratory judgment against the Secretary of Labor seeking a determination that SAMTA was exempt from the provisions of the FLSA.⁵ SAMTA moved for summary judgment asserting that under *National League of Cities v. Usery*, 426 U.S. 833 the FLSA "cannot be constitutionally applied to it." Alternatively, SAMTA argued that the decision in *National League of Cities* precludes enforcement of the FLSA against any state or local governmental body in the absence of a Congressional reenactment of a constitutionally valid amendment to that Act. The Secretary of Labor thereafter filed a motion for partial summary judgment.

On November 17, 1981, the District Court granted SAMTA's motion for summary judgment, finding that "local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral

⁵ On that same date appellant Joe G. Garcia, and fellow employees, had instituted an action in the district court against SAMTA for overtime pay under the FLSA. (*Garcia v. SAMTA*, SA 79 CA 458.) That suit was stayed pending disposition of the constitutional challenge herein. Garcia was granted leave to intervene as a defendant in this suit and the American Public Transit Association was permitted to intervene as a plaintiff.

operations in areas of traditional functions . . . and that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act. . . ." (p. 24a, *infra*) Consequently, the Department of Labor's classification of a public mass transit system as not being an integral operation in an area of traditional governmental functions (29 CFR § 775.3(b)(3)) was held to be "null and void" (p. 24a, *infra*). On January 19, 1982, the District Court stayed, pending an appeal, that portion of its judgment which enjoined the Secretary of Labor from applying or seeking to enforce the FLSA against all other public mass transit systems in the nation.

The Secretary of Labor and Garcia each appealed to this Court (Nos. 81-1728 and 81-1735). On June 7, 1982, this Court entered an order (457 U.S. 1102) vacating the judgment below and remanding the case to the District Court for reconsideration in light of *Transportation Union v. Long Island R. Co.*, 455 U.S. 678.

On remand, the District Court, after receiving briefs from the parties, reaffirmed its original decision and reentered summary judgment in favor of SAMTA and the American Public Transit Association (pp. 1a-18a, *infra*).

REASONS FOR GRANTING PLENARY CONSIDERATION OR SUMMARY REVERSAL

1. In *National League of Cities v. Usery*, 426 U.S. 833 ("National League"), this Court held that insofar as the minimum wage and maximum hours provisions of the Fair Labor Standards Act "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3 [the Commerce Clause]" (426 U.S. at 852). Then in *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264 ("Hodel") the Court set out a three pronged test to be applied in evaluating claims under *National League*:

[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged regulation regulates the 'States as States.' [426 U.S.], at 584. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' *Id.*, at 852. [452 U.S., at 287-288.] *

Hodel was reaffirmed in *Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 684 ("*Transportation Union*") where the issue was "whether the Tenth Amendment prohibits application of the Railway Labor Act to a state-owned railroad engaged in interstate commerce" (*id.* at 680). Analyzing the case on the basis of the third prong in the foregoing test—whether "the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" (*id.* at 684)—this Court answered that question in the negative, and upheld the application of the Railway Labor Act to the Long Island Railroad which had been "acquired by New York State through the Metropolitan Transportation Authority" (*id.* at 680). Thereafter, as previously noted, this Court remanded this case for reconsideration in light of *Transportation Union*, and the District Court determined that this Court's decision did not affect that court's prior con-

* In *Hodel*, the Court added:

Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission. See *Fry v. United States*, 421 U.S. 542 (1975), reaffirmed in *National League of Cities v. Usery*, 426 U.S., at 852-853. See also *id.*, at 856 (BLACKMUN, J., concurring). [452 U.S. at 288, n.29]

clusion that application of the FLSA to appellee SAMTA would be unconstitutional.

The holding of the District Court is contrary to decisions of three Courts of Appeals, each of which has unanimously decided, in light of *Transportation Union*, that Congress does have power under the Commerce Clause, to apply the minimum wage and maximum hour provisions of the FLSA to publicly owned transit companies. *Kramer v. New Castle Area Transit Authority*, 677 F.2d 308 (C.A. 3), *cert. den.* — U.S. —, 51 L.W. 3533 (Jan. 17, 1983); *Dove v. Chattanooga Area Reg. Transp. Auth. (CARTA)* 701 F.2d 50 (C.A. 6, March 4, 1983); *Alewine v. City Council of Augusta, Ga.*, 699 F.2d 1060 (C.A. 11, March 7, 1983). When the present case was here before, the Solicitor General wrote in support of his appeal, "In light of this Court's decision in *United Transportation Union* and the Third Circuit's decision in *Kramer*, which conflicts with the decision below, appellees' suggestion that this case does not warrant plenary consideration is frivolous."⁷ Now that two other Courts of Appeals have agreed with the Third Circuit's decision in *Kramer*, any suggestion by the present appellees that the judgment below should be affirmed without plenary consideration would be *trebly* "frivolous". Thus, the only nonfrivolous issue before the Court at this time is whether summary reversal of the District Court's aberrant conclusion is warranted. We shall state briefly the reasons why this course is appropriate.

2. In this case, as in *Transportation Union*, the claim of unconstitutionality founders on the third of the tests delineated in *Hodel*.⁸ In *Transportation Union* this Court said:

⁷ Reply Memorandum for the Appellant, No. 81-1728, p. 5.

⁸ In light of *Transportation Union*, we do not, in this Jurisdictional Statement, address the other matters which must be considered under *Hodel*, reserving those for discussion if this Court directs briefing and oral argument.

Operation of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not state or local governments. It is certainly true that some passenger railroads have come under state control in recent years, as have several freight lines, but that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. [455 U.S. at 686, emphasis in original, footnote omitted.]

The "historical reality" is that the operation of nonrail mass transit systems is likewise "not among the functions *traditionally* performed by state and local governments" (*id.*). As the Third Circuit detailed in *Kramer, supra*:

Local mass transit systems have historically been owned and operated by private companies. Some public operation started in the early part of this century—Seattle (1911), San Francisco (1912), Detroit (1921), and New York (1932)—yet as late as 1960, 95% of transit companies in the nation were privately owned and operated. H.R. Rep. No. 204, 88th Cong., 2d Sess., *reprinted in*, [1964] U.S. Code Cong. & Ad. News 2569, 2590. [677 F.2d at 309.]

In *Transportation Union*, the Court did not "look[] only to the past to determine what is 'traditional' ". (455 U.S. at 686.) Rather, as the Court explained:

In essence, *National League of Cities* held that under most circumstances federal power to regulate commerce could not be exercised in such a manner as to undermine the role of the states in our federal system. This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation. Rather it was meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "sep-

arate and independent existence." 426 U.S., at 851. [455 U.S. at 686-687].

Applying that principle the Court said:

Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation. [455 U.S. at 687].

Private mass transit, like the railroads, has long been subject to federal regulation under the Commerce Clause, as for example, the National Labor Relations Act. See *Bus Employees v. Wisconsin Board*, 340 U.S. 383; *Bus Employees v. Missouri*, 374 U.S. 74. Conversely, railroads, like mass transit companies, have long been subject to state as well as federal regulation. See, e.g., *Chicago, R.I. & P.R. Co. v. Arkansas*, 219 U.S. 453 ("full crew" law); *Engineers v. Chicago, R.I. & P.R. Co.*, 382 U.S. 423 (same); *Smith v. Alabama*, 121 U.S. 465 (licensing engineers who operate trains within the state); *Nashville, Etc. Railway v. Alabama*, 128 U.S. 96 (requiring engineers to obtain a certificate of fitness with regard to color-blindness and visual powers); and *N.Y., N.Y. & H. Railroad v. New York*, 165 U.S. 628 (regulating the mode of heating system passenger cars). Certainly then the pattern of federal and state regulation does not distinguish this case from *Transportation Union*.

The claim that federal statutory regulation is unconstitutional is especially unjustified here. In *Transportation Union*, the Court noted that "some passenger railroads have come under state control in recent years" (455 at 686). The same trend has been evident in mass transit. But as the Third Circuit also wrote in *Kramer*, *supra*:

In 1964, Congress passed the Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat.

802, *codified at* 49 U.S.C. §§ 1601 *et seq.* (UMTA), in recognition of the difficulties being experienced by the private mass transit industry. The principal purpose of the Act was to "provide [federal] assistance to State and local governments and their instrumentalities in financing . . . [transportation] systems, to be operated by public or private mass transportation companies as determined by local needs." 49 U.S.C. § 1601(b) (3).

The UMTA put inexorable forces in motion whereby, at an accelerated pace, transportation companies changed hands from the private sector to the public sector. By 1978, local publicly owned transit systems received 90% of the revenues from all transit operations; accounted for 91% of total vehicle miles operated and 91% of all linked passenger trips; and owned or leased 87% of total transit vehicles. (Scheuer Affidavit—App. 20a). Nonetheless, between 45 and 52% of all transit operations (counting each system, irrespective of size, as one unit) were privately owned. U.S. Dep't of Transportation, Urban Mass Transportation Administration. [References omitted.] The federal government is actively involved in local mass transportation. It provides: (1) capital grants, funded on a "80% federal/20% local" matching basis, (2) operating grants, on a "50% federal/50% local" matching basis; and (3) technical assistance to state and local planning agencies on an "80% federal/20% local" matching basis. [677 F.2d at 309-310].

The *Kramer* court drew the following lesson:

The whole move away from private transit systems and into public systems was started and effected by the federal government which provided the financial support to allow the changeover to public transportation companies. Moreover, the federal government has, through the matching funds programs, maintained an intimate involvement with the operation of such public systems. The result has been a network of publicly run systems which are cooperations between the federal government and the states. The

tradition that has evolved encompasses not only state involvement in local mass transportation but also an important federal role in the matter. The Authority cannot recast this development as one in which the states took over transit services on their own while the federal government only provided *post hoc* financial assistance. Massive state involvement with mass transit was *created* by the national government and the states are precluded from claiming, at this late date, that mass transit is a service which they traditionally provide. Tradition must be gauged in light of what actually happened, and what happened is a federal program of local transit service in which the states participate as late comer junior partners. There is, therefore, no tradition of the states *qua* states providing mass transportation. Moreover, since it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in this area. See generally, *United Transportation Union, supra*, —U.S. at —, 102 S.Ct. at 1354. [677 F.2d at 310, emphasis in original, footnote omitted.]

See also *Alewine, supra*, 699 at 1069, where much of the foregoing passage is quoted with approval. As the Sixth Circuit concluded in *Dove, supra*:

In this case, a traditionally private service has become predominantly a public service due to federal aid. *Kramer*, 677 F.2d at 809-10. In such a case, the concerns stated in *National League of Cities* are not implicated. It would indeed be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations. [701 F.2d at 53.]

In sum, the proposition that Congress by its generosity forfeited its authority under the Commerce Clause to regulate mass transit systems is too paradoxical to be entertained or even to warrant the serious consideration of this Court.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be summarily reversed. Failing that, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-457

SAN ANTONIO METROPOLITAN
TRANSIT AUTHORITY,
and *Plaintiff,*

AMERICAN PUBLIC TRANSIT ASSOCIATION,
Plaintiff-Intervenor,

vs.

THE HONORABLE RAYMOND J. DONOVAN,
SECRETARY [OF LABOR] OF THE UNITED STATES,
and *Defendant,*

JOE G. GARCIA,
Defendant-Intervenor.

[Filed Feb. 14, 1983]

MEMORANDUM OPINION

At issue in this case is whether operation of a local transit authority by the San Antonio Metropolitan Transit Authority (SAMTA), a political subdivision of the State of Texas, is a "traditional" government function entitled to the Tenth Amendment immunity recognized in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

On November 17, 1981, this Court granted Summary Judgment for SAMTA, finding that it performed a traditional state function that met all the requirements for Tenth Amendment immunity from the minimum wage and overtime pay provisions of the Federal Labor Standards Act (FLSA), 29 U.S.C. § 201, *et. seq.* A direct ap-

peal to the Supreme Court pursuant to 28 U.S.C. § 1252 followed. The Supreme Court remanded the case for reconsideration in light of its intervening holding in *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. —, 102 S.Ct. 1349 (1982) (hereinafter *LIRR*). 457 U.S. —, 102 S.Ct. 2897 (1982).

Upon further consideration, this Court finds nothing in *LIRR* that compels a change in its previous conclusions that operation of a public transit system is a government function entitled to Tenth Amendment immunity. When the factors considered by the Supreme Court in *LIRR* are applied to public transit, they indicate that it is once again appropriate to grant Summary Judgment for the Plaintiff and Plaintiff-Intervenor.

In *Usery*, the Supreme Court cut short the long reach of Congress' Commerce Clause power when it held that the Tenth Amendment prohibits the use of Commerce Clause power "to force directly upon the States its (Congress') choices as how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855. The distinguishing characteristic entitling a state function to Tenth Amendment protection from federal regulations has been described variously as "integral", "essential", "basic", and "traditional". Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult. Until *LIRR* the Supreme Court had not supplied guidelines for the application of its constitutional rule. Even after *LIRR*, the Court's own efforts at identifying a sovereign state function have been marked by disagreement. See, *Federal Energy Regulatory Commission v. Mississippi*, — U.S. —, S.Ct. 2136, 2141 n.30 (1982).

Like *LIRR*, this case deals with the third part of the analysis used in *Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, 101 S.Ct. 2352 (1981): whether the states' compliance with federal law directly impairs their ability to structure integral opera-

tions in areas of traditional functions. *Usery* has already decided that structuring wages is an integral operation. The only question is, therefore, whether public transit is one of "the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Usery*, 426 U.S. at 852 n.16 (emphasis added)

LIRR indicates at least three factors must be considered. First, historical reality is important. A long record of state activity in an area is one indication that a function is one of the essential types of activities that states have the primary responsibility for performing and must be free to perform if they are to meet their responsibilities to their citizens.

The focus on historical reality was not, however, intended "to impose a static historical view of state functions". 102 S.Ct. at 1354. Therefore, any other factors that, like historical reality, indicate that a function is presently a basic state prerogative, interference with which would impede the states' ability to fulfill their role in the federalist system, should also be considered. Analogy to the non-exclusive list of traditional functions set out in *Usery* and analysis under the four-part test developed in *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979) are both useful for this purpose.

Finally, in the special case of recent conversion of a private sector function to public ownership and operation, the history and scope of federal regulation must be considered to determine whether the conversion has the prohibited effect of eroding longstanding federal authority.

I. Historical Reality

Overseeing, maintaining, and regulating local and regional transportation systems historically has been a state responsibility. *Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1083 (5th Cir. 1979). These functions are matters of a "peculiarly local nature", and the

states' exercise of their prerogatives in this field has been given great deference. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523-24 (1959) (State highway regulations carry a strong presumption of validity.) See also, *Molina-Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841, 845-46 (1st Cir. 1982) (State agency that oversees roads and plans to build a mass transit system performs governmental activities traditional "from time immemorial."); *Amersbach*, 598 F.2d at 1037 ("Airports are indispensable" to "a principal mode of passenger transportation" and are therefore "traditional-integral governmental functions."); *United States v. Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (Licensing of drivers is an integral state function.); *United States v. State Road Department of Florida*, 255 F.2d 516, 518 (5th Cir. 1958) (Building and maintenance of a system of state roads is essentially a governmental function.)

Mass transit is an integral component of a state's transportation system. It has been treated as such from the time of the earliest transportation regulation in Texas up until the present day.¹

The historical reality of mass transit reveals a long record of state concern and activity in the field. The historical record is *not* one of predominately public ownership and operation of transit services.² *Kramer v. New*

¹ A 1913 state statute delegated to cities exclusive control over their streets and highways, including the power to regulate, license and fix fares for vehicles used to provide carriage for hire. 1913 Tex. Gen. Law, ch. 147, § 4, at 314, as codified, TEX. REV. CIV. STAT. ANN. art. 1175, §§ 20, 21 (Vernon 1963). A 1975 statute establishing a system of state funding for mass transit contained a policy declaration that "public transportation is an essential component of the state's transportation system." TEX. REV. CIV. STAT. ANN. art. 6663c, § 1(a)(2) (Vernon 1977).

² Public ownership and operation was not, however, unusual or unique. Some of the larger metropolitan areas in the country had publicly owned and operated systems as early as the beginning of this century. *Kramer*, 677 F.2d at 309.

Castle Area Transit Authority, 677 F.2d 308, 309 (3rd Cir. 1982), *cert. denied* — U.S. —, 51 U.S.L.W. — (January 17, 1983). Instead of owning and operating these services, states chose to manifest their interest through regulation of fares, routes, schedules, franchising, and safety. For example, a 1913 Texas statute gave cities the authority to regulate fares and operations of vehicles used to provide carriage for hire. *See*, fn.1, *supra*. A 1915 City of San Antonio ordinance established franchising, insurance, and safety requirements for all passenger vehicles operated for hire. Ordinance OF-1 (March 8, 1915). The City continued regulation through ordinances up until 1959, when the first steps in the transformation of the system from private to public hands were taken.

This record of state regulatory activity indicates that mass transit has traditionally been a state prerogative and responsibility, not a federal concern. That states chose to leave ownership and operation in private hands and to effect their interest through regulation does not negate the inference of sovereignty that arises from history. *Usery* sought to guarantee states the freedom to select the most suitable means to accomplish their goals in areas of unique and special concern to them. States would be victims of a strange irony if they are to be told that they are free to make their own decisions, but that they made the wrong choice and, therefore, decisions that otherwise meet the requirements for Tenth Amendment immunity³ will be displaced by federal regulations.

³ While the states' decision to regulate rather than own and operate a function should not control the determination of whether a function is one traditionally associated with the states, the decision may deprive the states of Tenth Amendment immunity for other reasons. *See, Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 101 S.Ct. 2352, 2364-69, where federal regulation of strip mining was found not to infringe on Tenth Amendment guarantees because the regulations did not regulate states as states, which is one of the requirements for Tenth Amendment immunity.

II. Recent Conversion and Prior Federal Regulation

Notwithstanding indications of Tenth Amendment immunity arising from a review of history, *LIRR* precludes Tenth Amendment immunity when it would erode federal authority over previously private functions recently converted to public ownership. 102 S.Ct. at 1355. The recent history of both mass transit in general and of SAMTA in particular⁴ includes such a conversion. *Kramer*, 677 F.2d 309. Unlike the railroad in *LIRR*, however, neither labor relations nor other aspects of mass transit have been the subject of federal regulation that will be eroded by recognizing a Tenth Amendment immunity.

In *LIRR*, the federal statute under attack was the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.* The Court found the act to be the most recent in a long history of federal railway labor relations statutes going back to 1888. 102 S.Ct. at 1335.

In this case, the federal statute under attack is the FLSA. Unlike the RLA, the FLSA is not a current manifestation of a traditional federal concern for labor relations in the mass transit field. Transit was specifically exempted from coverage from the time of the

⁴ Bus service in San Antonio was provided by a private company until 1959, when the city purchased the private system. The San Antonio Transit System, as it was called, was operated pursuant to the terms of a private revenue bondholders' indenture with a local bank. In 1978, the system's facilities and equipment were transferred to SAMTA, doing business under the name VIA Metropolitan Transit. SAMTA is a political subdivision of the State of Texas, created pursuant to Article 1118x of Vernon's Annotated Texas Statutes. It came into existence in 1977 by virtue of actions taken by the City Council of San Antonio, which were confirmed in a general election held in November, 1977. That same election authorized SAMTA to collect a one-half percent ($\frac{1}{2}\%$) sales tax. See Affidavit of Wayne M. Cook, paragraph 2 (filed April 30, 1980); Defendant-Intervenor Garcia's Memorandum in Response to Remand (filed November 15, 1982).

Act's original passage in 1938 until 1961 amendments subjected private transit operators to minimum wage provisions (but not the overtime pay provisions). Pub. L. No. 75-18, § 13(a)(9), 52 Stat. 1067 (1938); Pub. L. No. 87-30 §§ 2(c), 9, 75 Stat. 65, 66, 72 (1961). Public employers remained entirely exempt until 1966. Diminution of federal authority resulting from private to public conversions during this period would have been attributable to the statutory exemption and consistent with congressional intent.

The FLSA was amended again in 1966 and 1974, eventually subjecting public transit employers to the full range of the Act's wage and overtime pay provisions.⁵ It is the combined effect of these amendments that is at issue in this case. Because of their recent vintage alone, they cannot be the basis for finding a long standing federal regulatory scheme that will be eroded by a grant of Tenth Amendment immunity. *But cf., Scholz v. City of LaCross*, No. 80-C-238, slip op. (W.D. Wisc., September 1, 1982) (FLSA is the traditional federal regulation that precludes Tenth Amendment immunity for all public transit.)

⁵ The 1966 amendments extended the FLSA to states and their political subdivisions with respect to schools, hospitals, and "street, urban or interurban electric railway(s), or local trolley or motorbus carrier(s) . . . whose rates and services are subject to regulation by a State or local agency." Pub. L. No. 89-601, § 102, 80 Stat. 831 (1966). These amendments specifically exempted operators, drivers and conductors of such railways and carriers from the overtime provisions of the Act. *Id.* at § 206, 80 Stat. at 836. The constitutionality of these amendments was upheld with respect to schools and hospitals in *Maryland v. Wirtz*, 392 U.S. 183 (1968). The same provisions were later invalidated in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

The 1974 amendments eliminated completely the public employer exemption of the 1938 act and also repealed the overtime exemption for operational employees of transit services. Pub. L. No. 93-259, §§ 6, 21(b)(1); 88 Stat. 58, 68 (1974).

The National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* is another source of federal authority. It is a generally applicable federal statute that has governed labor relations for private transit companies since its enactment in 1935. The NLRA, like the FLSA prior to 1966, contains an exemption for state and local governments. Thus, any diminution of federal authority under the NLRA that results from a private to public conversion is attributable to this statutory exemption, not to the Tenth amendment, and is consistent with congressional intent.

Similarly, the Urban Mass Transit Act (UMTA), 49 U.S.C. § 1601 *et seq.* will not be eroded by Tenth Amendment immunity. UMTA is an exercise of the Spending Power, implementing federal interests by conditioning federal funding on *voluntary* compliance by states. *See*, discussion at III, A, *infra*. UMTA's labor relations provision, section 13(c) was not intended to impose federal regulation or displace state prerogatives in the field of transit labor relations. *Jackson Transit Authority v. Local Div. 1285; Amalgamated Transit Union*, — U.S. —, 102 S.Ct. 2202 (1982). Regardless of whether or not Tenth Amendment immunity is granted, states will still have to comply with federal standards if they want to continue receiving federal money.

The effect of federal anti-discrimination statutes will not be eroded by granting transit a Tenth Amendment immunity. *See, Pearce v. Wichita County*, 590 F.2d 128, 132 (5th Cir. 1979) (ability to discriminate is not a function essential to the separate and independent existence of the states). The Veteran's Reemployment Rights Act, 38 U.S.C. § 2021 *et seq.* will not be eroded by granting transit Tenth Amendment immunity. *Peel*, 600 F.2d 1070.

Nor will the effect of several federal statutes affecting aspects of mass transit other than labor relations be eroded. Defendant cites the Occupational Safety and Health Act, the Employees Retirement Income Security

Act and antitrust laws. Post-Hearing Memorandum on Federal Regulations of Transit (filed January 21, 1983). But, each of these statutes has either a statutory or judicial exemption for public employers that is the limitation on federal authority rather than the Tenth Amendment. 29 U.S.C. §§ 652(5), 1003(b)(1); *Community Communications v. City of Boulder*, 455 U.S. 40 (1982). The Clean Air Act will continue to apply. *Friends of the Earth v. Carey*, 552 F.2d 25 (2nd Cir.) *cert. denied* 434 U.S. 902 (1977). The federal income tax laws will continue to apply, and public transit employees, like firemen, police officers, nurses and even elected public officials will have to pay their federal income taxes.

Defendant and Defendant-Intervenors have not shown that the effectiveness of any federal statute other than the FLSA, the constitutionality of which is at issue, will be eroded by granting transit Tenth Amendment immunity. In the absence of any erosion of federal authority, nothing like *LIRR* precludes Tenth Amendment immunity for previously private functions converted to public ownership and operation. To the contrary, the rule announced in *LIRR* implicitly recognizes that some conversions—those that do not erode federal authority—will result in Tenth Amendment immunity. Many governmental functions of today have at some time in the past been private functions. To deny Tenth Amendment immunity on the ground that in the past the private sector was heavily involved in providing transit services would impose precisely the “static historical view of state functions” that *LIRR* eschews. 102 S.Ct. at 1354.

III. Other Factors Indicating Danger to the State's Separate And Independent Existence

LIRR tells courts that tradition is an important consideration because it can reveal whether a government function is so intimately connected with the states that “federal regulation . . . would be likely to hamper the

state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" 102 S.Ct. at 1355 (citation omitted). With that as the goal of a Tenth Amendment inquiry, a court should go beyond historical analysis and consider other factors that indicate a function is so closely associated with states that Tenth Amendment immunity is required.

A. Analogy

Analogy to the non-exclusive list of traditional state functions set out in *Usery* is one method of testing for Tenth Amendment immunity. See, *Fry v. United States*, 421 U.S. 522, 557-58 (1975) (Rehnquist, J. dissenting; proposes an analogy test); *Scholz*, slip op. at 5 (most productive analysis is by analogy to functions which have been found to be traditional).

Usery stated that fire prevention, police protection, sanitation, public health, and parks and recreation were among the "numerous line and support activities well within the area of traditional operations of state and local government." 426 U.S. at 851 n.16 (emphasis added). By overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968), the Court added to this list public schools and hospitals. The only state function specifically taken off the list is state operation of a commuter railroad.* *LIRR*, 102 S.Ct. at 1349.

The states themselves have given public transportation almost universal recognition as an essential state func-

* The Long Island Railroad and SAMTA perform identical functions, transporting commuter passengers to and from homes, work places, schools, and stores. If the railroad is not exempt, then, by analogy, the bus system should not be exempt. Under *LIRR*, however, bus systems must be distinguished from railroad lines on the basis of the absence of a history of federal regulation. See discussion at II, *supra*. For other distinctions between commuter railroads and commuter buses see the brief filed by the United States as an *amicus curiae* in *LIRR*. (attached as Exhibit A to SAMTA's Reply to the Defendants' Memoranda on Remand (filed November 23, 1982)).

tion, thus placing it on a par with the *Usery* functions. See, TEX. REV. CIV. STAT. ANN. art. 1118x, § 6(a) (Ver-non 1982 Supp.)⁷

It is also evident from Congressional debate on public transportation legislation that Congress recognized the similarities between public transit and the *Usery* functions. See, *Metropolitan Mass Transportation Legislation: Hearings Before Subcomm. No. 1 of the House Comm. on Banking and Currency*, 86 Cong., 2d Sess. 14, 26 (1960) ("it is as necessary to provide transportation for these new communities as it is to provide other public necessities such as water, sewers, police and fire protection and so forth" [statement of Rep. Addonizio] . . . "it is a vital public necessity that such service be provided, as necessary to economic life of the community as the provision of water, police and fire protection and other recognized public necessities [statement of Rep. Corbett]); 120 Cong. Rec. 1042 (1974) ("mass transit is as much an essential public service as the fire department or hospitals"

⁷ For other state laws decreeing public mass transit to be an essential function of government and showing that the concept embodied in Article 1118x is not unique to Texas, see *Inman Park Restoration, Inc. v. Urban Mass Transportation Administration*, 414 F. Supp. 99, 104 (N.D. Ga. 1975), *aff'd*, 576 F.2d 573 (5th Cir. 1978) (quoting an amendment to the state constitution providing that the public transportation of passengers for hire within a metropolitan area is an "essential governmental function"); *Henderson v. Metropolitan Atlanta Rapid Transit Authority*, 225 S.E.2d 424, 427 (Ga. 1976) (quoting a Georgia statute providing that MARTA is performing "an essential governmental function"); *Mass Transit Administration v. Baltimore County Revenue Authority*, 298 A.2d 413, 415 (Md. Ct. App. 1973) (quoting a Maryland statute that the Metropolitan Transit Authority is "performing an essential governmental function"); *Teamsters Local Union No. 676 v. Port Authority Transit Corp.*, 261 A.2d 713 (N.J. Sup. 1970) (same—New Jersey statute); *County of Niagara v. Levitt*, 411 N.Y.S.2d 810, 812 (Sup. N.Y. 1978) (same—New York statute); *Pennsylvania v. Erie Metropolitan Transit Authority*, 281 A.2d 882 (Pa. 1971) (same—Pennsylvania statute).

[statement of Sen. Biden]); 119 Cong. Rec. 4243 (1973) ("Mass transit is as much a public necessity as sanitation, police protection and education and can have the same overall community benefits." [statement of Sen. Hart]).

Moreover, it is extremely difficult to articulate an adequate basis upon which to distinguish public transit from the *Usury* functions. *Kramer v. New Castle Area Transit Authority*, 677 F.2d 308 (3rd Cir. 1982) *cert. denied* — U.S. —, 51 U.S.L.W. (January 17, 1983) is a case that presents precisely the question presented by this case. It distinguished public transit on the basis of the large amount of federal funding made available pursuant to UMTA and denied Tenth Amendment immunity to a public transit authority. The level of federal funding is an unsatisfactory distinction for three reasons.

First, UMTA is an exercise of the Congressional Spending Power granted in Article I, Section 8, Clause 1 of the Constitution. *Voluntary* cooperation by a state with federal regulations enacted as a condition for the receipt of federal funds does not have the same negative implications for state sovereignty as does the unavoidable *imposition* of a federal scheme. Even the Court in *Usury* stopped short of finding that exercises of the Spending Power intruded on states' Tenth Amendment rights. 426 U.S. at 852 n.17. UMTA establishes a system of "cooperative federalism" that resembles a number of other statutes that lack Tenth Amendment implications. *Hodel*, 101 S.Ct. at 2366. If a state does not wish to receive federal transit funds, there can be no suggestion that the federal government is imposing a federal regulatory program that displaces state decisions. *See, United States v. Ohio Department of Highway Safety*, 635 F.2d 1195, 1205 (6th Cir. 1980) *cert. denied* 451 U.S. 959 (1981) (federal scheme seeking to enforce statement cooperation not a Tenth Amendment violation if state remains free to make essential decisions).

Second, federal funding supports each of the *Usery* functions.⁸ At the time *Usery* was decided, the federal budget called for expenditures of \$716 million for law enforcement. 426 U.S. at 878 (Brennan, J., dissenting). During fiscal 1979, the Department of Education alone provided state and local governments with \$5.995 billion for education. Special Analysis, Budget of the United States Government Fiscal Year 1981 (Office of Management and Budget), pp. 267-68, table H-11. During 1979, the federal government likewise made grants to state and local governments of \$3.756 billion for sewage treatment plant construction, *id.* at 265; \$14.377 billion for health, *id.* at 269; and \$517 million for the administration of justice, *id.* at 270.

Transit survives on a mix of funding indistinguishable from that relied upon by many of the *Usery* functions. Transit, sanitation, hospitals, higher education and parks all combine operating revenues such as fares, user fees,

⁸ Some of the federal statutes authorizing financial support for state functions exempted in *Usery* are as follows:

Police: Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3701, *et seq.*; Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5601, *et seq.*

Fire: Federal Fire Prevention and Control Act of 1974, 15 U.S.C. § 2201, *et seq.*

Education: Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, *et seq.*

Public Health/Hospitals: Public Health Service Act, 42 U.S.C. § 201, *et seq.* (as amended by the Health Planning and Resources Development Amendments of 1979); Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6001, *et seq.*

Parks and Recreation: Urban Park and Recreation Recovery Act of 1978, 16 U.S.C. § 2501, *et seq.*; Housing and Community Development Act of 1974, 42 U.S.C. § 5301, *et seq.*

Sanitation: Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.*; Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3301, *et seq.*; Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*

tuition and admission fees with state and local tax revenues and federal subsidies. Institute of Public Administration, *Financing Transit: Alternatives for Local Government*, Table 10-2 at 228 (July 1979) (attached as Exhibit A to Brief for SAMTA in Opposition to Defendants' Motion to Strike and for Extension of Time (filed August 7, 1980); hereinafter *Financing Transit*); Affidavit of Wayne M. Cook, paragraph 6 (filed April 3, 1980).

Third, the recent dramatic shifts in federal priorities show that federal funding is a particularly inappropriate test for a state's Tenth Amendment immunity. Federal funding is responsive to changing political demands. Funding levels reveal what the federal government considers its interest to be at any one point in time, but they do not adequately measure a state's sovereign interest.

Importance of a function to a state's citizens is, like federal funding, an inadequate basis for distinguishing public transit from the *Usery* functions. Certainly, public transit is at least as important as parks and recreation and has as great a community-wide impact as hospitals.

Pervasiveness of government performance of a function is another inadequate distinction. It is true that not all cities and states provide public transit services. Defendant's Memorandum in Response to the Supreme Court Remand at 9-15 (filed November 3, 1982). But, in urban areas, where mass transit is a necessary service, there is pervasive government performance. In 230 of the 279 urban areas identified by the Department of Transportation (DOT), government provides transit services. SAMTA's reply to the Defendants' Memoranda on Remand at 11 (filed November 23, 1982) (hereinafter SAMTA's Reply). When mass transit service is provided, it is government that provides it over 90 percent of the time. *Kramer*, 677 F.2d at 309. This is a more pervasive gov-

ernment involvement than is present in hospitals, an exempt function under *Usery*. Only 177 of the 279 urbanized areas identified by DOT have hospitals operated by state or local government. SAMTA's Reply at 12.

A function's origins in the private sector is another inadequate basis for distinguishing transit from the exempt *Usery* functions. *LIRR*'s admonition against imposing a static historical view of government functions means that private sector origins do not legally preclude Tenth Amendment immunity. Hospitals, for example, had private sector origins. *Id.* at 17. Even though the Supreme Court now considers hospitals to have been fully transformed into a traditional and sovereign state function, private sector involvement remains significant. The private sector provides approximately half the hospital services in the United States. *Id.*; SAMTA's Memorandum in Response to the Remand at 12 n.5 (filed July 15, 1982).

If transit is to be distinguished from the exempt *Usery* functions it will have to be by identifying a traditional state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it.

B. The *Amersbach* Test

Another method of testing for Tenth Amendment immunity is to evaluate the four factors set out in *Amersbach v. City of Cleveland*, *supra*: (1) does the function benefit the community as a whole and is it made available at little or no direct expense; (2) is the function undertaken for public service rather than pecuniary gain; (3) is government particularly well suited to perform the function because of a community-wide need; and (4) is government the principal provider of the function? 598 F.2d at 1033. When applied to mass transit, these factors indicate that Tenth Amendment immunity is appropriate.

Public transit benefits the community as a whole, helping to eliminate air pollution, alleviate traffic congestions, conserve energy, and stimulate economic development. *See*, policy statements in the Urban Mass Transit Act of 1964, 49 U.S.C. §§ 1601, 1601a, and the National Mass Transportation Act of 1974, 49 U.S.C. § 1601b; *see also* TEX. REV. CIV. STAT. ANN. art. 1118x, § 1 (Vernon 1982 Supp.). Moreover, public transit is provided at a heavily subsidized price. Fares are nominal and account for only about 25 percent of operating expenses. Affidavit of Wayne M. Cooke at paragraph 6 (filed April 30, 1980). While some of the fare subsidy is from federal funding, a larger portion is from tax revenues collected pursuant to Texas statute. *Id.* The decision by the State of Texas to grant regional transit authorities and independent tax base and the election by San Antonio area voters to impose such a tax on themselves is another indication that public transit benefits the community as a whole.

The reality of transit industry economics is that services cannot be provided at a profit. *See*, 49 U.S.C. § 1601b (3), (4). Even with federal funds available, state and local tax dollars remain the predominate source of support. *See*, Financing Transit at 36. This is a clear indication that government provides transit for public service, not for pecuniary gain. These same facts indicate that government is particularly well suited to provide transit services. In the absence of a profit motive to attract private enterprise, government is the only component of society that can provide the service.

Finally, government is today the primary provider of transit services. When the total number of transit operations in the United States are counted without respect to size, state and local government owns and operates only about half the service. But, this is a misleading figure because state and local government provides the overwhelming majority of transit services. By 1978,

public transit accounted for 91 percent of total vehicle miles, 91 percent of linked passenger trips, 90 percent of revenues generated, and 87 percent of transit vehicles operated. *Kramer*, 677 F.2d at 308.

IV. Conclusion

The import of *LIRR* is two-fold. First, Tenth Amendment claims must be supported by a showing, based on historical reality or other factors, that when a line between state and federal prerogatives must be drawn, performance of the function at issue falls so clearly on the states' side of the line that imposition of federal authority would undermine the role of the states in our federal system. History indicates that transit falls on the states' side of the line. So do analogy to the *Usery* functions and application of the *Amersbach* test.

Second, *LIRR* announces a limitation on Tenth Amendment immunity. Notwithstanding indications from history or other factors, states and their political subdivisions may not erode existing federal authority by assuming ownership and operation responsibilities for functions previously performed by the private sector. No such federal authority exists to be eroded in the area of transit. The FLSA provisions challenged here are recent departures from an earlier policy in which Congress recognized states' interest in wage and hour regulation by exempting states. Even the federal regulation that deals most comprehensively with transit, UMTA, declined to impose federal authority, opting instead for a system of voluntary cooperation that recognizes the states' predominate interest in transit.

This Court finds that the imposition of FLSA wage and overtime pay provisions on state transit workers would undermine the states' role as surely as would the imposition of the same provisions on state employees performing police, fire, sanitation, health, and recrea-

tional services. It is, therefore, ORDERED that Summary Judgment be, and hereby is, reentered in favor of Plaintiff and Plaintiff-Intervenor, and Defendant's and Defendant-Intervenor's Motions for partial Summary Judgment be, and hereby are DENIED.

Signed this 14th day of February, 1983.

/s/ Fred Shannon
FRED SHANNON
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-457

SAN ANTONIO METROPOLITAN
TRANSIT AUTHORITY,

and *Plaintiff,*

AMERICAN PUBLIC TRANSIT ASSOCIATION,
Plaintiff-Intervenor,

vs.

THE HONORABLE RAYMOND J. DONOVAN,
SECRETARY [OF LABOR] OF THE UNITED STATES,
and *Defendant,*

JOE G. GARCIA,
Defendant-Intervenor.

[Filed Feb. 14, 1983]

JUDGMENT

Pursuant to the order of the United States Supreme Court remanding this case for further consideration, this Court has reviewed its order of November 17, 1981. Upon careful reconsideration of the motions for summary judgment filed by San Antonio Metropolitan Transit Authority and American Public Transit Association, the motions for ~~partial~~ summary judgment filed by the Secretary of Labor and Joe G. Garcia, and briefs, affidavits and other materials filed in support of these motions and in response to the remand, the Court concludes that there is no genuine issue as to any material facts in this cause and that the Plaintiff and Plaintiff-Intervenor are en-

titled to judgment as a matter of law. Therefore, the motions of San Antonio Metropolitan Transit Authority and American Public Transit for summary judgment shall be GRANTED, and the motions for partial summary judgment by Secretary of Labor and Joe G. Garcia shall be DENIED.

It is, therefore, ORDERED, ADJUDGED and DECREED:

1. That the motions for summary judgment of Plaintiff San Antonio Metropolitan Transit Authority and Plaintiff-Intervenor American Public Transit Association are hereby GRANTED;

2. That mass transit is an area of traditional governmental function under the decisions of the United States Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976) and *United States Transportation Union v. Long Island Railroad Company*, — U.S. —, 102 S.Ct. 1349 (1982), and that the adoption and implementation of wage and overtime pay policies is an integral operation in this area such that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* against publicly owned and operated mass transit systems in the United States, including San Antonio Metropolitan Transit Authority.

3. That the "Final Interpretation" issued by the Wage and Hour Division of the United States Department of Labor on December 21, 1979 (44 Federal Register 75628-75630) is null and void insofar as it lists local public mass transit systems as not being integral operations in areas of traditional governmental functions;

4. That the motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia are hereby DENIED.

5. That the counterclaim filed by the Secretary of Labor on February 8, 1980 is hereby DISMISSED without prejudice; and

6. That the Defendant Secretary of Labor and Defendant-Intervenor Joe G. Garcia pay all costs incurred in this action by Plaintiff and Plaintiff-Intervenor.

Signed this 14 day of February, 1983.

/s/ Fred Shannon
FRED SHANNON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action SA 79 CA 457

SAN ANTONIO METROPOLITAN
TRANSIT AUTHORITY,

and *Plaintiff,*

AMERICAN PUBLIC TRANSIT ASSOCIATION,
Plaintiff-Intervenor,

vs.

RAYMOND J. DONOVAN, SECRETARY
OF LABOR OF THE UNITED STATES,
and *Defendant,*

JOE G. GARCIA,
Defendant-Intervenor.

[Filed Mar. 16, 1983]

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. § 1252 and 2101(a), Joe G. Garcia hereby appeals to the Supreme Court of the United States from the amended Judgment of this Court in the above-captioned action entered on February 18, 1983 and effective as of February 14, 1983.

Respectfully submitted,

/s/ Linda R. Hirshman
LINDA R. HIRSHMAN

JACOBS, BURNS, SUGARMAN & ORLOVE
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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA 79 CA 457

SAN ANTONIO METROPOLITAN
TRANSIT AUTHORITY,

and *Plaintiff,*

AMERICAN PUBLIC TRANSIT ASSOCIATION,
Plaintiff-Intervenor,
v.

THE HONORABLE RAYMOND J. DONOVAN,
SECRETARY OF LABOR OF THE UNITED STATES,
and *Defendant,*

JOE G. GARCIA,
Defendant-Intervenor.

JUDGMENT

This cause was heard by this Court on September 10, 1981, upon motions for summary judgment filed by San Antonio Metropolitan Transit Authority and American Public Transit Association and motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia. The Court has carefully considered the motions, briefs, affidavits and other material on file in this cause and the arguments of counsel and finds that there is no genuine issue as to any material fact in this cause and that the Plaintiff and Plaintiff-Intervenor are entitled to a judgment as a matter of law. The Court accordingly finds that the motions of San Antonio Metropolitan Transit Authority and American Public Transit Association for summary judgment should be granted and that the motions for partial summary judgment of the Secretary of Labor and Joe G. Garcia should be denied.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED.

1. That the motions for summary judgment of Plaintiff San Antonio Metropolitan Transit Authority and Plaintiff-Intervenor American Public Transit Association are hereby granted;

2. That local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral operations in areas of traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976) and that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, against local public mass transit systems in the United States, including San Antonio Metropolitan Transit Authority;

3. That the "Final Interpretation" issued by the Wage and Hour Division of the United States Department of Labor on December 21, 1979 (44 Federal Register 75628-75630) is null and void insofar as it lists local public mass transit systems as not being integral operations in areas of traditional governmental functions under *National League of Cities v. Usery, supra*;

4. That the motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia are hereby denied;

5. That the counterclaim filed by the Secretary of Labor on February 8, 1980 is hereby dismissed with prejudice; and

6. That the Defendant Secretary of Labor and Defendant-Intervenor Joe G. Garcia pay all costs incurred in this action by Plaintiff and Plaintiff-Intervenor.

SIGNED this 17th day of November, 1981.

FRED SHANNON,
United States District Judge

APPENDIX E

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

The Congress shall have Power

* * * *

To regulate Commerce * * * among the several States * * *;

* * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI, cl. 2:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.*, provides in pertinent part:

29 U.S.C. (& Supp. III) 203:

As used in this chapter—

* * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an em-

ployer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For purposes of this subsection, the activities performed by any person or persons—

* * * * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

* * * * *

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

* * * * *

(6) is an activity of a public agency.

* * * * *

The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

29 U.S.C. (Supp. III) 206(a) :

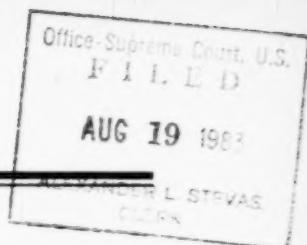
Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than \$2.65 an hour during the year beginning January 1, 1978, not less than \$2.90 an hour during the year beginning January 1, 1979, not less than \$3.10 an hour during the year beginning January 1, 1980, and not less than \$3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a) :

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Nos. 82-1951 and 82-1913



IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States District
Court For The Western District Of Texas

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether *National League of Cities v. Usery*, 426 U.S. 833 (1976), bars application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (1976 & Supp. V 1981) ("FLSA") to the operations of San Antonio Metropolitan Transit Authority because it is performing a traditional governmental function?

2. Whether the FLSA's minimum wage and overtime provisions, having been held inapplicable to most state and local government employees in *National League*, are inapplicable to all such employees in the absence of congressional enactment of a constitutionally valid amendment to that Act?

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Appellee San Antonio Metropolitan Transit Authority ("SAMTA"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the district court be affirmed on the ground that the judgment is plainly correct under controlling Supreme Court decisions.

STATEMENT

This is a direct appeal from a final judgment entered on February 18, 1983, holding that the minimum wage and overtime provisions of the FLSA cannot be constitutionally applied to SAMTA and to local public mass transit systems in the United States. SAMTA does not challenge the jurisdiction of this Court under 28 U.S.C. § 1252 (1976).

An Historical Overview Of The FLSA, As Applied To The States

The FLSA, as originally enacted in 1938, prescribed minimum wage and overtime compensation requirements for employees engaged in commerce or the production of goods for commerce. Specifically excluded were states and their political subdivisions as well as employees of "street, suburban, or interurban electric railway[s], or local trolley or motorbus carrier[s]." Pub. L. No. 75-718, §§ 3(d), 13(a)(9), 52 Stat. 1060, 1067 (1938).

In 1961, the FLSA was amended to extend minimum wage coverage to employees of private electric railways and trolley and motorbus carriers having gross revenues of one million dollars or more; an overtime exemption for all such employees was simultaneously enacted. Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72 (1961). The exemption from both the minimum wage and overtime provisions was continued for all employees of such entities having gross revenues of less than one million dollars. *Id.* § 9. The exemption for public employers remained unchanged.

In 1966, the FLSA was amended to cover states or their political subdivisions with respect to schools, hospitals, and

related institutions, and "street, suburban or interurban electric railway[s], or local trolley or motorbus carrier[s] . . . [whose] rates and services . . . are subject to regulation by a State or local agency. . . ." Pub. L. No. 89-601, §§ 102(a) & 102(b), 80 Stat. 830, 831 (1966). The threshold level for coverage was reduced to \$250,000, and the overtime exemption was changed to cover operators, drivers and conductors. *Id.* §§ 102(c), 206(c). In 1968, the amendment extending coverage to public schools and hospitals was held constitutional. *Maryland v. Wirtz*, 392 U.S. 183 (1968).

In 1974, the FLSA was amended to reach all state and local government employees and, in stages, to repeal the overtime exemption for drivers, operators and conductors effective May 1, 1976. Pub. L. No. 93-259, §§ 6(a)(1), 6(a)(6) & 21(b)(1), 88 Stat. 55, 58, 60, 68 (1974). The constitutionality of the amendments applying the FLSA to state and local government employees was challenged in a landmark case in which this Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art I, § 8, cl 3." *National League*, 426 U.S. at 852. The Court did not identify all state activities that are constitutionally protected, but listed by way of example "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. In overruling *Maryland v. Wirtz*, the Court also extended constitutional immunity to schools and hospitals. 426 U.S. at 855. The only activity identified as not being immune was a state-operated railroad. *Id.* at 854 n.18. Public transit was not mentioned.

On remand, the three-judge court recognized that this Court's decision did not provide an exhaustive list of exempt activities and left a gray area for future resolution. *National League of Cities v. Marshall*, 429 F. Supp. 703, 705-06 (D.D.C. 1977). The court expressed concern over potential monetary liability of government employers in this gray area, and in response, the Secretary of Labor issued regulations (29

C.F.R. §§ 775.2 & 775.3) under which the Wage and Hour Administrator is to determine those operations against which he will seek to enforce the FLSA and to publish those determinations as amendments to section 775.3(b).

The Proceedings In This Case

By letter dated September 17, 1979, to the Amalgamated Transit Union, the Deputy Wage and Hour Administrator concluded that "publicly operated local mass transit systems such as the San Antonio Transit System [SAMTA's municipally-owned predecessor] . . . are not within the constitutional immunity of the Tenth Amendment as defined by the Supreme Court in *National League*" On November 21, 1979, SAMTA filed this action for a declaratory judgment that the minimum wage and overtime provisions of the FLSA are inapplicable to its operations. SAMTA's operators then brought a separate action for alleged unpaid overtime and liquidated damages. The employees' action was stayed pending disposition of the constitutional issue in this suit. The Secretary of Labor counterclaimed against SAMTA for back-pay and injunctive relief, and the American Public Transit Association ("APTA") and Joe G. Garcia, one of SAMTA's employees, were permitted to intervene.

On November 17, 1981, the district court held that local public mass transit systems constitute integral operations in areas of traditional governmental functions under *National League* and entered summary judgment in favor of SAMTA and APTA. Gov't Jurisdictional Statement App. C. A direct appeal was taken to this Court, which vacated the district court's decision and remanded for "further consideration"¹ in light of its intervening decision in *United Transportation Union v. Long Island Rail Road*, 455 U.S. 678 (1982) ("LIRR"). *Donovan v. San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

¹ In his jurisdictional statement (pp. 5, 6), Garcia incorrectly states that this case was remanded for "reconsideration" in light of *LIRR*.

On February 18, 1983, the district court rendered its decision on remand and reentered summary judgment in favor of SAMTA and APTA.² The court articulated the question before it as "whether public transit is one of 'the numerous line and support activities which are well within the area of traditional operations of state and local governments.'" Gov't App. 3a (emphasis in original). The court found that the "record of state regulatory activity indicates that mass transit has traditionally been a state prerogative and responsibility, not a federal concern," and that "[u]nlike the railroad in *LIRR*, . . . neither labor relations nor other aspects of mass transit have been the subject of federal regulation that will be eroded by recognizing a Tenth Amendment immunity." Gov't App. 6a, 7a. The court also concluded that "[t]he states themselves have given public transportation almost universal recognition as an essential state function, thus placing it on a par with the [*National League of Cities v.*] *Usery* functions," and that "Congress [has] recognized the similarities between public transit and the *Usery* functions." Gov't App. 12a, 13a. The court rejected the contention that partial federal funding of public transit defeats *National League* immunity because the federal funding statute for transit "is an exercise of the Congressional Spending Power," "federal funding supports each of the *Usery* functions," and "the recent dramatic shifts in federal priorities show that federal funding is a particularly inappropriate test for a state's Tenth Amendment immunity." Gov't App. 14a, 16a.

The district court also rejected the "[p]ervasiveness of government performance of a function" and a "function's ori-

² The district court first issued its decision on February 14, 1983, but subsequently withdrew it and substituted the memorandum opinion that is the subject of this appeal. A copy of the district court's decision (*San Antonio Metropolitan Transit Authority v. Donovan*, 557 F. Supp. 445 (W.D. Tex. 1983)) has been reproduced as Appendix A to the Government's jurisdictional statement and is cited in this motion as "Gov't App." Garcia's jurisdictional statement, although reciting that the district court's opinion is reproduced as Appendix A, instead has reproduced the court's withdrawn February 14 opinion.

gins in the private sector" as bases for distinguishing transit from the functions exempted by this Court in *National League* and cited statistics showing that governmentally owned hospitals, which this Court specifically exempted in *National League*, would not be exempt under such a test. Gov't App. 16a, 17a. Finally, the court concluded that transit satisfies the four immunizing factors set out in *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979): transit "benefits the community as a whole"; it "is provided at a heavily subsidized price"; transit "services cannot be provided at a profit"; and "government is today the primary provider of transit services." Gov't App. 18a, 19a.³

³ Four federal appellate courts have considered the question whether public transit is constitutionally exempt from the FLSA. In *Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841 (1st Cir. 1982), the court held that a highway authority which had the power to operate a mass transportation system (and intended to build one) and which operated parking lots and charged a fee for the use of its highways, was exempt under *National League* because these activities, among others, were "sufficient to indicate that the Authority is responsible for 'traditional' or 'integral' governmental activities." *Id.* at 845. Relying upon *Amersbach*, the court could find "no meaningful distinction between the Authority's activities, and those, for example, of a municipal airport, . . . or the parks, recreation and public health activities mentioned in *National League of Cities* itself." 680 F.2d at 846. *National League* immunity was denied by the courts in *Alewine v. City Council of Augusta, Ga.*, 699 F.2d 1060 (11th Cir. 1983), *petition for cert. filed sub nom. City of Macon v. Joiner*, 51 U.S.L.W. 3884 (U.S. June 6, 1983) (No. 82-1974) and *Kramer v. New Castle Area Transit Auth.*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983), and summary judgment on this issue was reversed in *Dove v. Chattanooga Area Regional Transp. Auth.*, 701 F.2d 50 (6th Cir. 1983). *Alewine* and *Kramer* were based on an historical approach, which was eschewed by this Court in *LIRR*, and on federal funding under the Urban Mass Transportation Act, *infra*, which was foreclosed by this Court's unanimous decision in *Jackson Transit Auth. v. Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982). *Dove* relied in large part on this Court's denial of certiorari in *Kramer* and federal funding of transit.

Facts About Public Transit In San Antonio⁴

Publicly owned transit has existed in San Antonio since 1959, when the City of San Antonio acquired the San Antonio Transit Company and began providing transit as a municipal service through the newly created San Antonio Transit System ("SATS"). The City's purchase was financed by revenue bonds, and no federal funds were involved in the acquisition.

In 1973, the Texas Legislature enacted article 1118x, Tex. Rev. Civ. Stat. Ann. (Vernon Supp. 1982-1983), which authorizes the establishment of metropolitan rapid transit authorities and provides that they constitute "public bod[ies] corporate and politic, exercising public and essential governmental functions" *Id.* § 6(a).⁵

SAMTA was created under article 1118x by the City Council of San Antonio on February 3, 1977. An election was held on November 8, 1977 among "the qualified voters within the authority" (*id.* § 5(d)), confirming SAMTA's creation and authorizing SAMTA to levy a one-half percent sales tax. SAMTA then purchased the facilities and equipment of SATS from the City of San Antonio and commenced operations on March 1, 1978. SAMTA funded the purchase through bonds secured by its revenues and certain property. No federal funds were used in the purchase.

⁴ Unless another citation is given, the facts are taken from the affidavit of Wayne Cook, which is part of the record below.

⁵ Under article 1118x, an authority can, among other things, exercise the right of eminent domain; establish and maintain fares subject to approval by a local government approval committee; make all rules and regulations governing the use, operation and maintenance of the system; issue bonds and notes; levy and cause to be collected motor vehicle emission taxes; levy, collect and impose a local sales and use tax subject to a local election; and levy and collect any kind of tax other than an ad valorem tax on property which is not prohibited by the Texas constitution. *Id.* §§ 6, 6E, 7, 8, 11A, 11B. An authority *must* provide service to incorporated cities and unincorporated areas adjacent to its service area if the electorate of such adjacent city or area votes for annexation into the authority. *Id.* § 6A.

During its first two fiscal years, SAMTA's regularly scheduled line-service buses carried approximately 63.4 million passengers over more than 26.5 million bus miles. Of these passengers, approximately 5.3 million were senior citizens, 1.5 million were handicapped persons and 14.6 million were elementary, junior high, high school and college students, and children under 12. Approximately 3.3 million other student passengers were transported to and from school by SAMTA on nonline school bus service pursuant to arrangements with two Bexar County school districts. It is estimated that at least two-thirds of all passengers riding SAMTA's regular line-service buses are travelling to or from school or their jobs. SAMTA also serves the needs of the elderly and handicapped through a fleet of lift-equipped vans.

SAMTA is operated almost entirely with local sales taxes, federal funds and fare box receipts. Fares charged to passengers are nominal, ranging (when this case was first briefed below) from no charge for the smaller El Centro buses that circulate through the downtown area, up to 60¢ per ride for the longest runs, with children, the elderly and the handicapped paying 10¢. The average fare was 18¢. For SAMTA's first two fiscal years, total revenues from line-service fares were about \$10.1 million, compared to operating expenses for such services of about \$41.6 million.⁶ SAMTA had an operational deficit of about \$31.5 million, which was satisfied from sales taxes totalling approximately \$26.8 million, operational grants of approximately \$12.5 million from the Urban Mass Transportation Administration, and other operational revenues of approximately \$.7 million.

⁶ Fares thus constituted less than 25% of SAMTA's operating expenses for its first two fiscal years. In comparison, user charges as a percent of total costs in 1976-77 in the nation's 48 largest cities for other activities exempted by *National League* were 38% for sewage, 34% for hospitals and 27% for institutions of higher education. Institute of Pub. Admin., *Financing Transit: Alternatives for Local Government*, 228 tab. 10-2 (1979, prepared for the U.S. Dep't of Transp.).

ARGUMENT

I. TRANSIT IS A TRADITIONAL FUNCTION

In *National League*, this Court held that the States' power to determine their employees' wages, hours and overtime compensation is an "undoubted attribute of state sovereignty." 426 U.S. at 845. It identified the question before it as whether determinations of wages, hours and overtime "are 'functions essential to [the States'] separate and independent existence,' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 845-46. The Court discussed the effect the FLSA amendments would have on fire and police protection, but, noting disagreement among the parties as to the "precise effect the amendments will have in application," concluded that "particularized assessments of actual impact are [not] crucial to resolution of the issue presented" *Id.* at 851.⁷ The Court then held that "application [of the FLSA amendments] will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships" in activities "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* The Court observed that "[i]f Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.'" *Id.*⁸

⁷ This was reaffirmed in *EEOC v. Wyoming*, 103 S. Ct. 1054, 1063 (1983).

⁸ The Government's jurisdictional statement (p. 21; see also pp. 10, 25) contends that for public transit to be exempt under *National League*, it must be "an essential aspect of the states 'separate and independent existence.'" In making this argument, the Government has misread *National League*, which posited the question before it as follows:

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those

After *National League*, the only task remaining for the courts in FLSA cases is to complete the "catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Id.* at 851 n.16. Thus the issue before the Court is whether SAMTA (and local public mass transit generally) is one of these traditional functions. Transit is not materially different from the other activities exempted in *National League*, and the

persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are "functions essential to separate and independent existence," [case citation omitted], so that Congress may not abrogate the States' otherwise plenary authority to make them.

426 U.S. at 845-46 (emphasis added).

In answering this question in favor of the States, the Court established the principle that the power of the States to make wage and hour determinations is a function essential to their separate and independent existence and that Congress cannot regulate the States' prerogatives in this area when an integral or traditional activity of government is involved. The "separate and independent existence" test referred to by the Government has nothing to do with the determination whether an activity is traditional, but rather goes to the question whether the particular federal regulatory scheme itself unconstitutionally impairs state prerogatives that are essential to separate and independent existence—such as, in *National League*, the prerogative to prescribe wages and hours; in *LIRR*, the power to regulate railroad labor relations; and, in *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983), the right to discriminate on the basis of age. *National League* has already determined that the FLSA's interference with the States' right to set the wages and hours of public employees "threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking." *EEOC v. Wyoming*, 103 S. Ct. at 1062, thereby endangering the States' separate and independent existence, and that issue accordingly is not present in this case. The validity of SAMTA's position in this regard is underscored by the fact that parks and recreation (which *National League* listed as traditional) could not be exempt under the Government's erroneous formulation; nor could hospitals and refuse collection (sanitation) in view of the substantial private sector involvement in those activities. Similarly, libraries and museums, which the Secretary of Labor has exempted by regulation (29 C.F.R. § 775.4), would not meet the test for immunity asserted by the Government in this case.

district court's decision finding transit to be exempt is entirely consistent with *National League* as well as the Court's unanimous decisions in *LIRR* and *Jackson Transit Authority v. Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982).

A. TRANSIT SATISFIES THE TESTS FOR NATIONAL LEAGUE IMMUNITY ARTICULATED IN UNITED TRANSPORTATION UNION v. LONG ISLAND RAIL ROAD, 455 U.S. 678 (1982).

In *LIRR*, the Court held that the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (1976 & Supp. V 1981), can be constitutionally applied to a "[state-owned] railroad engaged in interstate commerce," but acknowledged that "under most circumstances federal power to regulate commerce [cannot] be exercised in such a manner as to undermine the role of the states in our federal system." 455 U.S. at 685, 686 (emphasis added). Although *LIRR* involved a different statute raising different considerations from the FLSA, the factors upon which the Court's decision turned support the decision below.

In *LIRR*, the Court focused upon four crucial attributes of railroads, which do not exist in the case of local transit: (1) railroads are part of a national rail network requiring uniform federal regulation; (2) railroads have been subject to comprehensive, long-standing federal regulation; (3) railroads have no comparable history of state regulation; and (4) the railroad in *LIRR* was only one of two state-owned passenger railroads in the United States. The Court also emphasized that the Long Island Railroad voluntarily operated for years under the Railway Labor Act without any claim of disruption. The facts and authorities which follow demonstrate that each of these elements is inapplicable to SAMTA.

1. Transit Is Not Part Of A National Transportation Network.

In *LIRR*, the Court emphasized the interstate nature of railroads and their role as a component part of the national rail system. Thus, the Court noted that the Long Island Railroad "connects with lines of railroads which serve other parts of the

country [,] . . . supplies Long Island's only freight service [and] does a significant volume of freight business." 455 U.S. at 680 n.1. The Court concluded:

[T]he Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. In particular, Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy. A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system. Congress determined that the most effective means of preventing such disruptions is by way of requiring and facilitating free collective bargaining between railroads and the labor organizations representing their employees.

. . . To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system.

Id. at 688-89.

In contrast, SAMTA provides a purely local service. It serves only Bexar County in which two-thirds of its passengers are going to or from work or school. During its first two fiscal years, approximately twenty percent of its local line-service passengers were students or children, and another 3.3 million students were carried on nonline service under arrangements with school districts.⁹ SAMTA also serves Bexar County hospitals and provides mini-bus service in the downtown area.

Unlike the railroad industry, there is no national transit system; nor has Congress ever concluded that "uniformity" in transit is essential. In fact, the contrary is evident from the Administration's plan to eliminate transit operating subsidies:

Primary responsibility for mass transit should remain with State and local governments. *Decisions about serv-*

⁹ In this respect, SAMTA is engaged in an activity integral to education.

ice levels, equipment and facilities, fares, *wage rates* and management practices *are better left to local decision-makers*. Excessive levels of Federal assistance unfortunately lead to excessive Federal interference in these local decisions.

Major Themes & Additional Budget Details Fiscal Year 1983 at 121 (Executive Office of the President, Office of Mgmt. & Budget 1982) (emphasis added); *see also Major Themes & Additional Budget Details Fiscal Year 1984* at 81-82 (Executive Office of the President, Office of Mgmt. & Budget 1983).

Any disruption of a transit system is a purely local problem which, unlike an interstate railroad, has no impact on other transit systems serving other localities around the nation.

The Government's reference in its jurisdictional statement (pp. 18, 19) to the Urban Mass Transportation Act's (49 U.S.C. § 1601, *et seq.* (1976 & Supp. V 1981) ["UMTA"]) characterization of the decline of transit services as a problem requiring a "nationwide program" and the Government's portrayal of public transit as a "venture in 'cooperative federalism'" between the States and federal government does not enhance its position one whit since Congress has made the same observations about virtually all of the other activities exempted by *National League*.¹⁰ Examples are:

Health and Hospitals: Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.* (1976 & Supp. V 1981), establishes a "joint

¹⁰ For the same reasons, the Government's reliance (jurisdictional statement p. 20 n.24) on the fact that some transit systems are "areawide" or "operate across state lines" is also misplaced. *E.g.*, S. Rep. No. 96-96, 96th Cong., 1st Sess. 33-34, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1306, 1338-39 (of 205 health service areas, 15 are interstate, one is tristate and 13 encompass interstate SMSA's); S. Rep. No. 11, 88th Cong., 1st Sess. 5, *reprinted in* 1963 U.S. Code Cong. & Ad. News 664, 667 (Secretary of Interior should "encourage interstate and regional cooperation in the planning, acquisition, and development of outdoor recreation resources"); *History of Public Works in the United States 1776-1976* at 416, 418 (American Public Works Ass'n 1976 [referred to herein as "*History of Public Works*"]) ("[i]nterstate compacts have offered a more effective means of promoting regional water pollution control" . . . the 1948 Water Pollution Control Act (Pub. L. No. 80-845, 62 Stat. 1155 (1948)) provided for "interstate cooper-

Federal-State system for assuring compliance with these standards" (H.R. Rep. No. 93-1185, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6454, 6455). National Health Planning & Resources Development Act of 1974, 42 U.S.C. § 300k, *et seq.* (1976 & Supp. V 1981) will "assure the development of a national health policy"; Hill-Burton Act, Pub. L. No. 79-725, 60 Stat. 1041 (1946) (current version at 42 U.S.C. § 291, *et seq.* (1976 & Supp. V 1981)), providing for hospital construction, was a "Federal-State partnership"; "national guidelines" for health planning are needed; it is the "responsibility of the Federal government to intervene" to upgrade large urban hospitals (S. Rep. No. 93-1285, 93d Cong., 2d Sess. 1, 19, 42, 59, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7842, 7859, 7882, 7898).

Sanitation: Solid Waste Disposal Act, Pub. L. No. 89-272, Title II, 79 Stat. 997 (1965), requires that "immediate action must be taken to initiate a national program directed toward finding and applying new solutions to the waste disposal problem"; "[t]he problem of solid waste disposal is all-pervasive and has become national in scope . . . [and] will require the combined resources of the Federal, State, and local governments as well as industry and research institutions" (H.R. Rep. No. 899, 89th Cong., 1st Sess. 7, 22, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3608, 3614, 3627). "[P]roblems of waste disposal . . . have become a matter national in scope" (Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6901(a)(4) (Supp. V 1981)).

ation"); H.R. Rep. No. 899, 89th Cong., 1st Sess. 8, 27, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3608, 3615, 3634 (federal financial assistance is needed to encourage and help the states and interstate agencies undertake surveys of solid waste and develop plans on a "statewide or interstate basis" . . . "interstate and interlocal cooperation" is needed); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1288(a)(3) (1976) (providing for "areawide waste treatment management plans" for multistate areas); Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6946(c) (1976) (providing for "interstate [solid waste disposal] regions"); Crime Control Act of 1973, Pub. L. No. 93-83, 87 Stat. 197, 200 (1973) (amended 1979) (providing for "interstate metropolitan regional planning units").

Education: The "purpose" of the Elementary & Secondary Education Act of 1965, 20 U.S.C. § 236, *et seq.* (1976 & Supp. V 1981) "is to meet a national problem" (S. Rep. No. 146, 89th Cong., 1st Sess. 4, *reprinted in* 1965 U.S. Code Cong. & Ad. News 1446, 1449).

Fire: "Fire is a major national problem" (S. Rep. No. 93-470, 93d Cong., 1st Sess. 6, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6191, 6196). The federal government is a "partner in attaining" the goal of improving the quality of local fire service delivery (Advisory Comm'n on Intergovernmental Relations, *The Federal Role in Local Fire Protection* 18 (1980)).

Police: "Crime is a national catastrophe"; "[t]here are certain national objectives which are vital to every citizen of this country, and the elimination of crimes is one of the foremost among these objectives" (S. Rep. No. 1097, 90th Cong., 2d Sess. 31, 179, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2117, 2239). The role of the Law Enforcement Assistance Administration is a "partner with State and local governments" (S. Rep. No. 91-1253, 91st Cong., 2d Sess. 14, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5804, 5805).

Each of these "national" problems has received congressional attention and support. Yet, each is exempt from FLSA coverage.

2. Transit Has Not Been Subject To Comprehensive And Long-Standing Federal Regulation.

In *LIRR*, the Court relied heavily on the fact that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century." 455 U.S. at 687. The Court concluded that "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas *traditionally subject to federal statutory regulation.*" *Id.* (emphasis added).

Unlike the "national rail system," *LIRR*, 455 U.S. at 688, federal regulation of transit has been no greater than that governing the activities specifically exempted by *National*

League. There is no scheme of federal regulation designed to provide uniformity among transit systems, as in the case of railroads, which are subject to an array of industry-specific federal laws.

The Government's argument (jurisdictional statement pp. 22-26) that the federal government has adopted comprehensive, long-standing regulation of transit finds no support in the federal statutes it cites.

The National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* (1976 & Supp. V 1981), and therefore the Labor-Management Reporting & Disclosure Act, 29 U.S.C. § 401, *et seq.* (1976 & Supp. V 1981) (see definition of "employer," *id.* § 402(e)), apply to the activities specifically exempted in *National League* when performed by private sector employers. *E.g.*, *Crestline Memorial Hospital Association, Inc. v. NLRB*, 668 F.2d 243 (6th Cir. 1982); *Florence Volunteer Fire Department, Inc.*, 265 NLRB No. 134 (1982); *Champlain Security Services, Inc.*, 243 NLRB 755 (1979); *Nichols Sanitation, Inc.*, 230 NLRB 834 (1977); *Tulane University*, 195 NLRB 329 (1972); *Oakland Scavenger Corp.*, 98 NLRB 1318 (1952). A law of general application that regulates virtually every private employer in the country, including those activities (*e.g.*, hospitals, schools and sanitation) exempted in *National League* that have substantial private sector involvement, cannot be equated with the comprehensive federal statutes specifically regulating railroads. In fact, in view of the almost universal applicability of the NLRA to employers in the United States, the Government's argument would impose the "static historical view of state functions" shunned by this Court in *LIRR*, 455 U.S. at 686, since any new activity undertaken by a state—no matter how necessary or important—would be denied Tenth Amendment protection if it was previously performed to any degree by the private sector.¹¹ Furthermore, as

¹¹ The all-encompassing breadth of the NLRA is evident from the fact that it applies even to the local activities of charitable and beneficent organizations. *E.g.*, *Cincinnati Ass'n for the Blind v. NLRB*, 672 F.2d 567 (6th Cir.), *cert. denied*, 103 S. Ct. 78 (1982) (sheltered workshop for blind workers);

noted by the district court (Gov't App. 9a), the NLRA "contains an exemption for state and local governments." It would indeed be an anomaly to deny Tenth Amendment protection to the States based upon a statute that Congress specifically decreed shall not apply to the States.

The Government also relies on the fact that the Equal Pay Act (29 U.S.C. § 206(d) (1976)) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.* (1976 & Supp. V 1981)) apply to transit. This logic is circular because those same statutes apply to public employers providing activities exempted by *National League*. *E.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (upholding Title VII's application to the States); *Pearce v. Wichita County Hospital Board*, 590 F.2d 128 (5th Cir. 1979) (applying Equal Pay Act to a public hospital).

The Government's reliance on the 1961 and 1966 FLSA amendments is misplaced. Private transit systems were by statute exempt before 1961, and therefore during the first twenty-three years of its existence, the FLSA was totally inapplicable to transit. The 1961 amendments extended the FLSA only to private systems with revenues exceeding one million dollars, but even then exempted all employees from the overtime requirements. Even the 1966 amendments continued the overtime exemption for operators. It was not until 1976 that even private transit was brought fully under the FLSA's overtime requirements, but this was pursuant to the 1974 amendments, whose constitutionality is challenged in this very action, and which accordingly cannot provide bootstrap sup-

NLRB v. Southeast Ass'n for Retarded Citizens, Inc., 666 F.2d 428 (9th Cir. 1982) (nonprofit organization that trains the handicapped); *NLRB v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (church-operated center for battered, abused and neglected children); *Rhode Island Catholic Orphan Asylum*, 224 NLRB 1344 (1976); *Salvation Army*, 225 NLRB 406 (1976); *Boys & Girls Aid Society of San Diego*, 224 NLRB 1614 (1976) (nonprofit residential treatment for emotionally disturbed children); *Children's Village, Inc.*, 186 NLRB 953 (1970) (nonprofit home for delinquent children).

port for the Government's position. The vast majority¹² of private and public transit employees have been subject to the full play of the FLSA only since 1976, and this hardly constitutes long-standing or comprehensive federal regulation of wage and hour practices or any other aspect of transit operations.

3. There *Is* Long-Standing State Regulation Of Transit.

In holding the Long Island Railroad to be nontraditional, the Court also relied upon the fact that "[t]here is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry."¹³ 455 U.S. at 688. The reverse is true of transit in Texas and San Antonio.

State and local regulation of transit in Texas dates back at least 70 years. In 1913, an enabling act was passed by the Texas legislature delegating to the cities exclusive control over their streets and highways, including the powers:

To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to

¹² During SAMTA's first fiscal year, operators' salaries and wages were approximately \$6.62 million or about 69% of \$9.6 million in total salaries or wages, which shows that the majority of SAMTA's employees are operators. Garcia's Appendix below at 62. See also *Amendments to the Fair Labor Standards Act: Hearings on S. 763, et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare, 89th Cong., 1st Sess.* 314 (1965) (referred to herein as "*Hearings on S. 763*"), which shows that of 54,697 total transit employees, 38,597 (70%) were operating personnel.

¹³ The Government's argument (jurisdictional statement pp. 16-17) that state regulation of transit is not an appropriate consideration thus improperly disregards an important element of the test for immunity articulated in *LIRR*.

provide for the giving bond or other security for the operation of the same.

To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire.

...

1913 Tex. Gen. Laws, ch. 147, § 4, at 314, *as codified*, Tex. Rev. Civ. Stat. Ann. art. 1175, §§ 20, 21 (Vernon 1963).

In 1915, the City of San Antonio passed a comprehensive ordinance to regulate all types of vehicles operated for hire to transport passengers. San Antonio, Tex., Ordinance OF1-1 (Mar. 8, 1915). The ordinance required owners of vehicles, including motor buses, to obtain a franchise from the city for transporting passengers for hire on city streets; established license application and fee specifications and insurance or bond requirements; and specified vehicle safety features such as lighting, speed and driver age and conduct. Another comprehensive ordinance was enacted in 1921, updating the 1915 ordinance and including a designated motor bus route and terminals. San Antonio, Tex., Ordinance OF-266 (Dec. 1, 1921).

The City continued to regulate fares, routes, schedules and franchises of private transit companies until 1959, when it created SATS and purchased the assets of SATS' predecessor pursuant to a state law authorizing cities to issue bonds for the purchase, construction or improvement of street transportation systems. Tex. Rev. Civ. Stat. Ann. art. 1118w (Vernon 1963 & Supp. 1982-1983). Public mass transit in San Antonio changed again after state legislation in 1973 authorized a change from a municipal to a metropolitan facility. Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Supp. 1982-1983). The history of transit in San Antonio, from a city-controlled private franchise, to a city-owned system in 1959 and to an autonomous metropolitan authority in 1978, illustrates the traditional role

of the city and state in providing and regulating efficient transportation for the convenience and welfare of local citizens.¹⁴

4. State And Local Government Are The Principal Providers Of Transit

In finding the Long Island Railroad not to be a traditional function of state government, this Court noted that only two of seventeen commuter railroads in the United States were public. One of those was the Long Island itself, which was converted from a "private stock corporation to a public benefit corporation" in 1980. 455 U.S. at 681. The other was the Staten Island, which became public in 1971. *Id.* at 686 n.12. See also *Employees of the Department of Public Health & Welfare v. Missouri Department of Public Health & Welfare*, 411 U.S. 279, 285 (1973) (state-owned railroad in *Parden v. Terminal Railway Co.*, 377 U.S. 184 (1964) was "a rather isolated state activity").¹⁵

In *LIRR*, the Court stated that it was not imposing a "static historical view of state functions generally immune from feder-

¹⁴ Other Texas statutes regulating intracity bus systems are Tex. Rev. Civ. Stat. Ann. art. 1015 (Vernon 1963) (authorizing governing bodies of cities to license, tax and regulate omnibus drivers); art. 1181 (Vernon Supp. 1982-1983, original version at 1913 Tex. Gen. Laws, ch. 147, § 9, at 317) (confirming that cities have exclusive power to grant franchises for the use of public streets); art. 6663c (Vernon 1977 & Supp. 1982-1983) (authorizing state assistance to cities for establishment of mass transit systems); art. 6675a-2 (Vernon 1977) (providing for registration of motor vehicles); art. 6675a-5 (Vernon Supp. 1982-1983) (setting annual license fees for street and suburban buses); art. 6675a-13 (Vernon 1977) (establishing license plate requirements for motor vehicles required to be registered); art. 6687b, § 5 (Vernon 1977) (establishing requirements for drivers of motor vehicles used as school buses); art. 6698 (Vernon 1977) (authorizing incorporated towns to collect city permit fees on motor vehicles transporting passengers for hire).

¹⁵ Commuter railroads are not even considered part of mass transit. "The urban transit industry includes all 'companies and systems primarily engaged in local and suburban mass passenger transportation over regular routes and on regular schedules' except commuter railroads and limousine service. . . ." Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Indus. & Lab. Rel. Rev. 95 (1971) (emphasis added).

al regulation." 455 U.S. at 686.¹⁶ The decision of the district court extending immunity to SAMTA and public mass transit applied the same principle.

Local transit in San Antonio has been publicly owned and operated since 1959. In 1979 all eighteen municipal transit systems in Texas operating five or more vehicles in scheduled, fixed route, intracity service were publicly owned or operated. *1979 Texas Transit Statistics 1* (Tex. Dep't of Hwys. & Pub. Transp. 1980). Nationally, 94% of all transit riders use public mass transit. APTA, *Transit Fact Book 1981* at 27. The figures in the Government's jurisdictional statement (p. 14 n.17) showing that roughly half of the 686 transit systems in urban areas over 50,000 population are public is misleading since those 686 systems include the smallest, with only one bus, and the largest with over 2000 buses. The publication from which these figures are taken reflects that the principal provider of transit services in each of the 25 largest urban areas in the United States and in at least 100 of the 106 urban areas having populations exceeding 200,000 is public. *Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service*

¹⁶ In its jurisdictional statement (p. 18), the Government contends that *LIRR* held that "historical evidence is of paramount importance." The quotation in the text from *LIRR* repudiates this contention and is in keeping with earlier Supreme Court pronouncements. *E.g.*, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 75 (1978) ("[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions"); *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955) ("it is hard to think of any governmental activity on the 'operational level' . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed"); *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("There cannot be any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental . . . [T]he people—acting . . . through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires").

in *Urbanized Areas Over 50,000 Population* (Dep't of Transp. 1981) (referred to herein as "*DOT Directory*").¹⁷

It is also clear that the States regard transit "as [an] integral part[] of their governmental activities," which is another test for *National League* immunity. 426 U.S. at 854 n.18.¹⁸ Article 1118x provides that metropolitan transit authorities are "essential governmental functions"¹⁹ and are not "proprietary." *Id.* §§ 6(a), 13A. Article 6663c, § 1(a)(2), Tex. Rev. Civ. Stat. Ann. (Vernon 1977) provides that "public transportation is an essential component of the state's transportation system. . . ."

Perhaps most apposite to transit are the Court's observations in *Brush v. Commissioner of Internal Revenue*, 300 U.S.

¹⁷ The Government's attempt (jurisdictional statement p. 15) to equate public mass transportation with commuter railroads conflicts with the position it took in its amicus brief in *LIRR*. For example, on page 12 of that brief, the Government insisted that the Long Island Railroad "remains a railroad—an integral part of the interstate railroad industry and plainly distinguishable from conventional intraurban transit systems." (emphasis added). The Government contended that this distinction "is firmly grounded in the separate histories of these two sectors of the transportation industry, in the applicable law, and in the usages of the industry," *id.* at 25 n.19, and contrasted the two public commuter railroads (out of seventeen) with the more than 1000 transit systems in the United States, "nearly half of [which], including most of the largest ones, carrying a total of 91% of all transit passengers, were owned by public agencies." *Id.* at 27 n.20. The Government cited these statistics in support of its contention that "public ownership and operation of conventional transit systems is substantially better established than is such operation of commuter railroads." *Id.*

¹⁸ As noted by the district court (Gov't App. 13a), the fact that public transit is an essential governmental activity, no different from the other activities exempted in *National League*, is evident from the legislative histories of the federal urban mass transit legislation, which equated transit with such essential public necessities as water, sanitation, police and fire protection, hospitals and education.

¹⁹ Examples of "other state laws decreeing public mass transit to be an essential function of government" are cited in the district court's memorandum opinion. Gov't App. 12a n.7.

352 (1937), tracing the evolution of private water service into an essential function of government:

We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions. . . .

We find nothing that detracts from this view in the fact that in former times the business of furnishing water to urban communities, including New York, in fact was left largely, or even entirely, to private enterprise. The tendency for many years has been in the opposite direction, until now in nearly all the larger cities of the country the duty has been assumed by the municipal authorities. Governmental functions are not to be regarded as non-existent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are nonetheless so because the use of them has had a recent beginning.

Id. at 370-71.²⁰

Although public transit, like water service, was once largely a function of private enterprise, it has evolved into an essential function of state and local government, and this Court's conclusions are no less applicable to transit today than they were to water service forty-six years ago.²¹ See also *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979) (extending FLSA immunity to a municipal airport and holding that the

²⁰ The question in *Brush* was whether the salary of a city official was subject to federal income taxes. The Court concluded it was not, based upon its holding that the city was performing an essential governmental function in furnishing water to the public. Although the Court's ruling on the income tax question is no longer valid in view of subsequent decisions upholding federal taxation of local government officials even when they are performing sovereign governmental functions, the Court's comments, quoted in the text, remain timelessly valid.

²¹ For this reason, *Helvering v. Powers*, 293 U.S. 214 (1934), relied upon by the Government (jurisdictional statement p. 17), is inapposite. *Powers* was written 49 years ago when public transportation was in its formative stage and mass transit as we know it today did not exist. Just as the provision of water passed from the private sector into an essential governmental service in *Brush*, transit has become a vital service provided almost ex-

"terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times").

5. SAMTA Has Never Acceded To FLSA Coverage.

In *LIRR*, the Court relied on the fact that the "State knew of and accepted" the Railway Labor Act and "operated under [it] for 13 years without claiming any impairment of its traditional sovereignty." 455 U.S. at 690. When the Long Island Railroad was sued for a declaratory judgment that the Railway Labor Act rather than the New York Taylor Law applied, its response "was to acknowledge that the Railway Labor Act applied." *Id.* Then, while the suit was pending, it converted to a public benefit corporation "apparently believing that the change would eliminate Railway Labor Act coverage and bring the employees under the umbrella of the Taylor Law." *Id.* at 681.

Unlike the Long Island Railroad's acceptance of the Railway Labor Act, SAMTA has never accepted FLSA coverage of its operations. When the Deputy Wage and Hour Administrator issued his September 17, 1979 ruling that local transit is constitutionally within the FLSA, SAMTA promptly brought this action challenging the deputy administrator's ruling.

clusively by the States as an "integral part[] of their governmental activities," *National League*, 426 U.S. at 854 n.18, and as a "service[] which their citizens require," *id.* at 847. The States provide transit as a matter of public necessity rather than by choice, and they clearly are not "running . . . a business enterprise" or conducting a "business activit[y] which [has] as [its] aim the production of revenues in excess of costs," *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 418 n.1, 424 (1978) (Burger, C. J., concurring). See also *Reeves, Inc. v. Stake*, 447 U.S. 429, 449-52 (1980) (Powell, J., dissenting) (noting distinction between the "State as government and the State as trader," *id.* at 450). To compare the street railway in *Powers* as it existed in 1934 with the modern taxpayer-subsidized transit services that urban residents demand as an indispensable governmental service is tantamount to comparing the automobile with the horse and buggy.

B. TRANSIT SYSTEMS ARE ANALOGOUS TO HOSPITALS.

As noted by the district court, "[a]nalogy to the non-exclusive list of traditional state functions set out in *Usery* is one method of testing for Tenth Amendment immunity." Gov't App. 11a. Although public transit has much in common with all of the other exempt activities, comparison with the hospital industry makes it clear beyond a peradventure that transit is exempt.

Public sector involvement in hospitals is not as well established as in the transit field. For example, in 1980, of this nation's 7,051 hospitals, only 2,562 (36%), including federal facilities, were under government control. *Statistical Abstract of the United States 1982-83* tab. 171, at 111 (U.S. Dep't of Commerce, Bureau of Census, 1982). By comparison, in 1981, 598 (58%) of the 1,025 transit systems of all sizes were owned by state or local governments.²² As a further comparison, a 1965 Senate Hearing Report states that "[t]here are 79 cities in which the dominant transit system is publicly owned and operated . . . [whose] employees . . . represent approximately 56% of the total employees in the local transit industry." *Hearings on S. 763* at 309. Almost 10 years later, in 1974, "56% of all hospital employees" worked for "non-public hospitals." S. Rep. No. 93-766, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Ad. News 3946, 3948. Hospitals have their roots in the private sector, and to this day are primarily private:

The hospitals established in the eighteenth and nineteenth centuries were constructed and run by proprietary groups and church and other nonprofit organizations. This form of ownership remains the predominant characteristic of United States medical facilities.

History of Public Works 490.

²² DOT Directory 19; U.S. Dep't of Transp., A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service 13 (1981).

Federal funding has also played a significant role in the development of hospitals. Before 1946, more than 1,000 counties in the nation had no health facilities at all. A. Treloar & D. Chill, *Patient Care Facilities: Construction Needs and Hill-Burton Accomplishments* 11 (1961). In 1946, the Hill-Burton Act, *supra*, was passed to improve the situation, and more than half of hospital construction accomplished under that Act has been in areas with no hospital facilities. Treloar, *supra*, at 12, 14. "[R]oughly, 42 per cent of the county hospitals in operation in 1956 opened" after the end of World War II, and "[u]ndoubtedly, much of this latter growth was due to the federal grants for hospital construction received under the terms of the Hill-Burton Act of 1946. . . . In the state of Texas alone, fifty-three such institutions were founded in the interval from 1946 to 1956." J. Hamilton, *Patterns of Hospital Ownership and Control* 76 (1961).

In its jurisdictional statement (p. 14), the Government notes that some public transit systems have management contracts with outside concerns. The same arrangement exists with hospitals. In 1980, investor-owned firms held 150 management contracts with city or county hospitals. *City, County Contracts Lead to Hospital Sales*, *Modern Healthcare*, Sept. 1980 at 44. The most rapid growth in this area has occurred in municipal and county owned facilities and includes the 1,300-bed Cook County Hospital in Chicago, J. Goldsmith, *Can Hospitals Survive?* 114 (1981), and the 1465-bed John J. Kane Hospital in Pittsburgh, Mannisto, *For-Profit Systems Pursue Growth in Specialization and Diversification*, *Hospitals*, Sept. 1, 1981 at 72. Moreover, unlike public transit systems, which have become predominantly publicly owned, many public hospitals are selling out to private operators. Hull, *How Ailing Hospital in South Was Rescued by a For-Profit Chain*, *Wall St. J.*, Jan. 28, 1983, at 1, col. 1. Furthermore, hospitals have long been subject to the very same statutes cited by the Government as regulating transit. In fact, when *National League* was decided, there had been more extensive FLSA coverage of hospitals and schools since both activities were brought totally under the FLSA in 1966, whereas public tran-

sit was given an overtime exemption for operating employees until 1976. Yet, this Court had no difficulty in exempting both hospitals and schools under the Tenth Amendment.²³

C. FEDERAL FUNDING OF TRANSIT IS IRRELEVANT.

In its jurisdictional statement (pp. 18-20) the Government challenges *National League* immunity on the ground that funds provided under UMTA allegedly hastened the public takeover of transit systems. This contention draws absolutely no support from *National League* or *LIRR*, it constitutes a convoluted attempt to apply Spending Power arguments in a Commerce Clause case, and it is invalidated by this Court's decision in *Jackson Transit Authority v. Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982).

Initially, it should be noted that neither the City of San Antonio nor SAMTA received one cent of federal assistance in acquiring the local transit operations in San Antonio. The City bought the San Antonio Transit Company's assets in 1959, five years *before* federal grants were available. SAMTA acquired SATS' equipment and facilities in 1978 through the issuance of bonds payable only out of local revenues—not out of federally provided funds.

More importantly, this Court's decision in *Jackson Transit* forecloses the Government's federal funding argument. In that case, a unanimous Court rejected a transit union's claim that through the grant of UMTA funds Congress intended to regulate transit labor relations. The Court specifically held that "Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations be-

²³ Data regarding the exempt activity of solid waste collection (sanitation) provides analogous reenforcement for the Tenth Amendment immunity of public transit. In 1975, private firms collected residential refuse in 67% of 2,060 cities of all sizes surveyed, 61.4% of which relied entirely on private firms. E. Savas, *The Organization and Efficiency of Solid Waste Collection* 45, 63 (1977). "Waste disposal is one of today's hot new glamour industries . . . [which] has become a \$10 billion business. . . ." Blyskal, *Glittering, Glamorous Garbage*, *Forbes*, June 8, 1981 at 156.

tween local governmental entities and transit workers." *Id.* at 27. It follows that receipt of those very same funds cannot abrogate the Tenth Amendment rights of those same governmental entities, particularly since nothing in UMTA requires compliance with the FLSA. See *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously").²⁴

In arguing that UMTA grants affect transit's *National League* immunity, the Government is really making a Spending Power argument in a Commerce Clause case. This difference was explicitly recognized in *National League*. 426 U.S. at 852 n.17. The Court obviously did not consider federal funding relevant since the dissent pointed out that during fiscal 1977 the President's proposed budget recommended \$60.5 billion in assistance to the States, including \$716 million for law enforcement assistance. *Id.* at 878.²⁵

²⁴ See also § 9(d) of UMTA (49 U.S.C. § 1608(d) (Supp. V 1981)), which prohibits use of UMTA provisions to "regulate in any manner the mode of operation of any mass transportation system" receiving a section 1602 grant except to require compliance with "undertakings furnished . . . in connection with the application for the grant."

²⁵ Even if UMTA funding were taken into account, local government's use of federal funds to acquire transit operations as a necessary step to ensure continuation of an essential local service is not materially different from federal subsidization of other local government activities which are exempt under *National League*. For example, between 1973 and 1981, \$33.3 billion was appropriated for wastewater treatment plant construction, which was second only to federal-aid highway programs in terms of federal public works expenditures. *Municipal Wastewater Treatment Construction Grants Program: Hearings on S. 975 & S. 1274 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment & Public Works*, 97th Cong., 1st Sess. 7, 16 (1981). This is almost three times the \$13 billion in federal aid to transit which the Government (jurisdictional statement p. 19) claims were made by 1978. An activity specifically exempted in *National League*, which was essentially created as a result of federal funding, is solid waste management (sanitation). According to *State Activities in Solid Waste Management*, 1974 at iii (EPA, Office of Solid Waste Mgmt. Programs 1975) "[m]ost of the State programs in solid waste management originated only within the past decade, under the stimuli of Federal planning grants and technical assistance authorized by the Solid Waste Disposal Act of 1965." See

II. THE FLSA CANNOT BE APPLIED TO ANY STATE OR LOCAL GOVERNMENT EMPLOYEES ABSENT A CONSTITUTIONALLY VALID AMENDMENT²⁸

The necessary result of *National League* is to remove the great majority of state and local government employees from the provisions of the FLSA. Although the FLSA has a severability clause (29 U.S.C. § 219 (1976)), which creates a presumption that unconstitutional provisions of the FLSA are severable, see *INS v. Chadha*, 103 S. Ct. 2764, 2774-76 (1983), that clause does not authorize the application of the FLSA, which has been held unconstitutional as to a majority of the class of public employees it was intended to cover, to the

also discussion, *supra*, regarding the role of federal funds in the development of public hospitals.

During fiscal 1980 (the last year for which such data could be found), over \$445 million in federal grants were made to local governments and private entities and individuals in Bexar County. This included approximately \$6.4 million in construction grants for wastewater treatment works, \$.9 million for parks and recreation, \$44.6 million for education, \$96.8 million for health and human services, \$47.9 million for housing and urban development, \$23.6 million for comprehensive employment and training programs, \$2 million for airports, \$9.5 million for UMTA capital and formula grants, and \$15.8 million for revenue sharing. *Geographic Distribution of Federal Funds in Texas* 17-20 (Community Serv. Admin. 1980). In fiscal 1982, federal aid to Texas and its political subdivisions was \$3.73 billion. *Federal Aid to States Fiscal Year 1982* at 1 (Dep't of the Treasury, Fiscal Service-Bureau of Gov't Fin. Operations, Div. of Gov't Accounts & Reports (1983)). This sum included approximately \$190 million for elementary and secondary education, *id.* at 8; \$173 million for construction of wastewater treatment works, *id.* at 10; \$682 million for medical assistance, *id.* at 11; \$8 million for law enforcement assistance, *id.* at 17; \$20 million for airport and airway trust fund, *id.* at 19; \$78 million for UMTA assistance, *id.* at 21; and \$233 million in general revenue sharing, *id.* at 21.

²⁸ This question was pled and briefed in the proceeding below, but the district court did not pass on its merits. The Court may consider that issue since "an appeal under 28 U.S.C. § 1252 brings the 'whole case' before the Court." *Fusari v. Steinberg*, 419 U.S. 379, 387 n.13 (1975); accord, *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977).

remainder of the class, thereby creating a program different from the one Congress actually adopted.²⁷

In *Sloan v. Lemon*, 413 U.S. 825 (1973), a three-judge district court had declared a Pennsylvania statute, which provided for reimbursement of funds for nonpublic education, to violate the First Amendment's establishment clause because it applied to sectarian schools. Although the state law contained a severability clause, the court declined to sever out sectarian schools because "so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations, it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools." *Id.* at 834. The Court was asked to declare the provision severable and allow tuition reimbursement for parents of children attending schools that were not church-related. The Court declined the invitation because "[t]he statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted." *Id.*

Recently, in *Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1981), the Court affirmed the Ninth Circuit's decision (631 F.2d 135 (1980)) that the unconstitutionality of injunction and closing order provisions of a Washington moral nuisance law required invalidation of the entire statute despite the presence of a severability clause. Relying on *Sloan*, the court of appeals had held that the elimination of a vital part of the statutory scheme would eviscerate the statute and create a

²⁷ Extension of the 1974 FLSA amendments to public employees not excluded by the *National League* holding would also result in judicial reformulation of the amendments to add words of limitation (codifying this Court's "traditional governmental function" holding into the FLSA's definition of "public agency") where none presently exist. A severability clause does not intend for courts "to dissect an unconstitutional measure and reform a valid one out of it by inserting limitations it does not contain [since] [t]his is legislative work beyond the power and function of the court." *Hill v. Wallace*, 259 U.S. 44, 70 (1922) (involving a severability clause indistinguishable from the one in the FLSA).

program quite different from the one actually adopted. This Court affirmed by memorandum.

National League withdraws from FLSA coverage a major part of the class of public employees which Congress intended to include. The FLSA sets up no dichotomy between traditional and nontraditional governmental functions, and therefore to reframe the statute to incorporate such a distinction would create a program different from the one Congress actually adopted. *See also Meek v. Pittenger*, 421 U.S. 349, 371 n.21 (1975). *INS v. Chadha*, 103 S. Ct. 2764 (1983) does not require a different result. Congress relied on this Court's decision in *Maryland v. Wirtz*, 392 U.S. 183 (1966) when it extended the FLSA to the entire public sector, and it presumably did not intend to enact a program covering only a small number of public employees. *See H. R. Rep. No. 93-913*, 93d Cong., 2d Sess. 6-7, *reprinted in* 1974 U.S. Code Cong. & Ad. News 2811, 2816-17; *see also* 118 Cong. Rec. 24,240, 24,749 (1972).

CONCLUSION

SAMTA respectfully submits that the judgment of the district court is manifestly correct and should be summarily affirmed. If the Court concludes that summary affirmance is inappropriate, then the case should be briefed and argued.

Respectfully submitted,

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Dated: August 19th, 1983

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Metropolitan Transit Authority

Nos. 82-1951 and 82-1913

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND
AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND
AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees.

On Appeals From The United States District
Court For The Western District Of Texas

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Does *National League of Cities v. Usery*, 426 U.S. 833 (1976), in concluding that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act interfere with an essential attribute of state sovereignty and therefore cannot constitutionally be applied to traditional governmental functions, preclude application of these statutory provisions to publicly owned local mass transit systems?

2. Did that decision find unconstitutional so much of Congress' intended coverage of state and local governmental functions by the minimum wage and overtime compensation provisions of the Fair Labor Standards Act that it is unwarranted to apply these requirements to publicly owned local mass transit systems without new congressional enactment?

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MOTION TO AFFIRM

The American Public Transit Association ("APTA"), appellee, moves, pursuant to Rule 16 of the Supreme Court, to affirm the judgment of the court below on the ground that such court correctly held that *National League of Cities v. Usery*, 426 U.S. 833 (1976), controls this case.

STATEMENT OF THE CASE

1. San Antonio established a publicly owned local mass transit system in 1959.¹ In 1978, appellee San Antonio Metropolitan Transit Authority ("SAMTA") acquired the assets from the city and now operates the local public transit system providing service to the city and most of Bexar County, Texas. SAMTA, a political subdivision of the State of Texas, is "exercising public and essential governmental functions." Tex. Rev. Civ. Stat. Ann. art. 1118x § 6(a) (Vernon Supp. 1982). SAMTA provides bus service to the entire community at fares which cover only 25 percent of operating expenses, and service at reduced fares for school children, the elderly and the handicapped. Some downtown service is provided free of charge. The operational deficit is recovered through government funding, more than one-third of which is generated by state sales tax revenues. Acquisition of the system was financed entirely by public bonds; no federal funds were used.

2. This case arises out of a dispute between the States and the federal government that has ensued since 1966, when Congress, acting pursuant to its Commerce Clause powers, amended the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981) ("FLSA"), at-

¹ Facts concerning local transit in San Antonio are drawn from Affidavit of Wayne M. Cook accompanying Brief for San Antonio Metropolitan Transit Authority in Support of Motion for Summary Judgment.

tempting for the first time to include a limited number of state activities within its coverage. In that year, it extended FLSA coverage to public as well as private schools, institutions, hospitals, and some public employees of "street, suburban or interurban electric railway, or local trolley or motorbus carrier[s],"² Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 830, 831. The operators, drivers and conductors of covered transit services, however, were excluded by specific exemption from the overtime compensation provisions of the 1966 statute. Pub. L. No. 89-601, § 206, 80 Stat. 830, 836 (1966). The 1966 amendments extended the limited coverage of private transit enacted in 1961, Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72, to similar categories of public transit employees. In 1974, after this Court's decision in *Maryland v. Wirtz*, 392 U.S. 183 (1968), affirmed the power of Congress to cover state activities, Congress amended the statute to embrace most state and local employment relationships in areas where private employers were covered. The overtime exemption for transit operators, private or public, was phased out over a two-year period. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 21(b), 88 Stat. 55, 68.

State and local governments successfully challenged Congress' attempt to apply the FLSA wage and hour provisions to most activities of state and local governments in *National League of Cities v. Usery*, 426 U.S. 833 (1976). This Court cited several examples of the numerous state activities affected by its decision, but did not

² Street electric railways are a form of local transit as are trolleys and buses. Historically they have not been part of the main-line railroad system, unlike commuter railroads, see American Public Transit Association, *Transit Fact Book* 72 (1981) ("*Transit Fact Book*").

specifically include or exclude publicly owned local mass transit.

3. Federal appellant first indicated its intent to apply the FLSA to publicly owned local mass transit over two years after *National League of Cities* was decided, in a letter dated September 17, 1979 to a transit union.³ SAM-TA learned of the letter and sued on November 21, 1979 to declare such application unconstitutional. APTA, the members of which include most of the local mass transit systems owned by state and local governments, intervened. On December 21, 1979, federal appellant formally amended its FLSA regulations—without any public notice or comment—to assert that local publicly owned mass transit agencies do not perform a traditional governmental function, and therefore are subject to the FLSA. 44 Fed. Reg. 75,628 (1979); 29 C.F.R. § 775.2(b) (1982).⁴ Federal appellant also counterclaimed on behalf

³ Letter from the Deputy Administrator of the United States Department of Labor to the Amalgamated Transit Union (September 17, 1979), Brief of American Public Transit Association in Support of Motion for Summary Judgment, Exhibit A.

⁴ Also listed in the regulation as functions to which the federal government believed the FLSA could be applied were off-track betting corporations, generation and distribution of electric power, provision of residential and commercial telephone and telegraphic communication, production and sale of organic fertilizer as a by-product of sewage processing, production, cultivation, growing or harvesting of agricultural commodities for sale to consumers, and repair and maintenance of boats and marine engines for the general public. 29 C.F.R. § 775.3(b) (1982). At the same time, federal appellant indicated that the Department of Labor would not seek to apply the FLSA to libraries and museums. 29 C.F.R. § 775.4(b) (1982).

of SAMTA's employees for back pay⁵ and injunctive relief.⁶ An employee, Joe G. Garcia, intervened.

The district court granted SAMTA's and APTA's motions for summary judgment on November 17, 1981, ruling that local public mass transit systems (including SAMTA) are "traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976)." U.S. J.S. App. 23a. Appellants here appealed directly to this Court pursuant to 28 U.S.C. § 1252 (1976). The Court vacated the judgment and remanded the case "for further consideration in light of [the later-decided] *United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678 (1982) [("*LIRR*")]."
Donovan v. San Antonio Metropolitan Transit Authority, 457 U.S. 1102 (1982).

4. After further briefing and oral argument, the district court found that this Court's decision and reasoning

⁵ The FLSA authorizes the Secretary of Labor to seek back pay and equal liquidated damages for employees for up to three years if an employer did not compensate employees in the manner established by the FLSA. 29 U.S.C. § 216(c) (1976 & Supp. IV 1980).

⁶ While this action is the only case in which the federal government is a party, the issue has been raised in other federal appellate courts. Compare, e.g., *Molina-Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982) (concluding that the FLSA may not be applied to a state highway and transit authority) with *Alewine v. City Council of Augusta*, 699 F.2d 1060, *reh'g denied*, 707 F.2d 523 (11th Cir. 1983), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Aug. 17, 1983) (No. 83-257); *City of Macon v. Joiner*, 699 F.2d 1060 (11th Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 388 (U.S. June 3, 1983) (No. 82-1974); and *Kramer v. New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983) (concluding that the FLSA may be applied to local publicly owned mass transit systems). See also *Dove v. Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (6th Cir. 1983) (reversing grant of summary judgment for transit agency and remanding for further proceedings).

in *LIRR* were fully consistent with its previous conclusion that "operation of a public transit system is a governmental function entitled to Tenth Amendment immunity." U.S. J.S. App. 2a.⁷

ARGUMENT

In *National League of Cities*, this Court reviewed the same statutory provisions at issue here and decided that the ability to determine the wages, hours and overtime compensation of state and local employees is an essential attribute of state sovereignty. The Court therefore held that FLSA wage and overtime requirements may not be applied to state and local governments where they "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852.

In subsequent decisions, this Court has addressed Tenth Amendment challenges to Congress' exercise of Commerce Clause power in other statutory contexts. In each case it distinguished the federal statutory provisions at issue in *National League of Cities*, consistently reaffirming that the FLSA wage and overtime provisions cannot constitutionally be applied to the traditional functions of state and local government. *EEOC v. Wyoming*, 103 S. Ct. 1054, 1060 (1983); *FERC v. Mississippi*, 456 U.S. 742, 758-59 (1982); *United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678, 685 (1982); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 287-88 (1981). Thus, the only question now before this Court is whether to apply *National League of Cities* to an activity of state and local

⁷ The court's order of February 14, 1983 was withdrawn and reentered effective on that date on February 18, 1983 to correct typographical errors.

government that, while not specifically mentioned in that opinion, is one of the "numerous line and support activities," 426 U.S. at 851 n.16, that "states have traditionally afforded their citizens," *id.* at 851.⁸

The facts in the record fully support the finding of the court below that publicly owned local mass transit is in an area of traditional governmental functions. Summary affirmance is therefore appropriate.

I. The Narrow Issue In This Case Is Whether Publicly Owned Local Mass Transit Is A Traditional Function Of State And Local Government

As its subsequent decisions have made increasingly clear, in *National League of Cities* this Court conclusively determined all but possibly one of the requirements for invalidating application of the FLSA to local publicly owned mass transit. See *LIRR*, 455 U.S. at 684 n.9; *Hodel*, 452 U.S. at 287-88. First, this Court held that application of the FLSA to the States and their political subdivisions is a regulation of the "States as States," 426 U.S. at 845. Second, it decided that the FLSA's regulation of minimum wage and overtime compensation for state and local employees addresses a matter that is an "undoubted attribute of state sovereignty." *Id.* Furthermore, in *LIRR* this Court recently confirmed that *National League of Cities* had considered the balance between the federal and state interests, see 426 U.S. at 852-53, see also *id.* at 856 (Blackmun, J., concurring), and had determined that the federal interest in the FLSA was

⁸ *National League of Cities* was founded on an analysis of the limitations imposed by the Tenth Amendment and our system of federalism on the otherwise legitimate exercise of congressional Commerce Clause powers; the issue is not, as appellant Garcia suggests, G. J.S. at 11, whether "Congress by its generosity forfeited its authority under the Commerce Clause."

not "so great as to 'justif[y] State submission.'" *LIRR*, 455 U.S. at 684 n.9 (quoting *Hodel*, 452 U.S. at 288 n.29).

The one issue not expressly resolved by *National League of Cities* is whether publicly owned local mass transit is a traditional governmental function. This is the sole question presented because *National League of Cities* has already decided the first part of the final inquiry: whether requiring the States to comply with a federal law would "directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" *Hodel*, 452 U.S. at 288 (citation omitted).⁹ Here, the federal law is the FLSA, which when applied to traditional governmental functions, "impermissibly interfere[s]" with an essential attribute of state sovereignty, leaving little of the "States' 'separate and independent existence,'" 426 U.S. at 851 (citation omitted).¹⁰ *National*

⁹ This was "the key prong of the *National League of Cities* test" applicable to *LIRR*, 455 U.S. at 684, and was the focus of the inquiry in *EEOC* as well, 103 S. Ct. at 1061. Distinguishing *National League of Cities*, however, this Court found that the statutory provisions at issue in *EEOC* (the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976) (as amended)) did not unconstitutionally displace an attribute of state sovereignty and those in *LIRR* (the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1976)) did not involve a traditional state governmental function.

¹⁰ Contrary to federal appellant's suggestion, U.S. J.S. at 18-21, the inquiry mandated by *National League of Cities* into whether imposition of a federal program would endanger the States' "separate and independent existence," 426 U.S. at 851, calls for evaluation of the effect on state sovereignty by the displacement of state policy choices regarding wages and hours, rather than consideration of whether state provision of certain services, *e.g.*, transit, parks, and hospitals, is essential to the States' "separate and independent existence," *id.* As the Court stated in *EEOC*, "application of the federal wage and hour statute to the States threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking." 103 S. Ct. at 1062 (citation omitted).

League of Cities held that federal displacement of the States' prerogative to establish wage and overtime compensation for their employees engaged in areas of traditional functions would impair the States' "ability to function effectively in a federal system," *id.* at 852 (citation omitted).¹¹

As this Court reaffirmed in *EEOC*, "*National League of Cities* held that 'there are attributes of sovereignty attaching to every state government which may not be

¹¹ "[P]articularized assessments of actual impact" of federal regulations, of course, are not necessary since it is the States' policy choices that are constitutionally protected. *National League of Cities*, 426 U.S. at 851. "The determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States." *FERC*, 456 U.S. at 770 n.33 (quoting *Hodel*, 452 U.S. at 292 n.33).

The FLSA overtime requirements, however, do have a direct impact on the ability of state and local governments to choose how they structure routes, employee work hours, service schedules, record keeping and wage rates. For example, the FLSA requires payment of time-and-one-half for hours worked over forty hours per week, which is computed in accordance with a federal statutory formula. 29 U.S.C. § 207(a) (1976); 29 C.F.R. § 197 (1982). Many public transit systems find it necessary to schedule their employees in two split shifts at peak commuter hours, *see, e.g., Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 303 (1965) (testimony of C. Cochran), and to provide premium compensation for the split scheme in lieu of FLSA mandated overtime, *cf. Fair Labor Standards Amendments of 1973: Hearings on H.R. 4757 and H.R. 2831 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 165 (1973) (testimony of C. Cochran), *id.* at 170 (testimony of F. Hill); S. Rep. No. 300, 93d Cong., 1st Sess. 126 (1973) (minority views of Messrs. Dominick, Taft and Beall).

Such scheduling is not merely a matter of management efficiency; it is a means, for example, by which the State facilitates employment

impaired by Congress' and that '[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work and what compensation will be provided where these employees may be called upon to work overtime.' 426 U.S. at 845." 103 S. Ct. at 1061 n.11. Thus, *National League of Cities* has decided part of the final test, leaving unresolved only whether local publicly owned mass transit is a traditional function of state and local government. The district court in this litigation answered in the affirmative. This precise issue, in keeping with the suggestion of the federal government in that case,¹² was not addressed in *LIRR*.

II. The Lower Court Decision Is Compelled By *National League Of Cities*

As the district court concluded, the provision of publicly owned local mass transit services is as integral to the public responsibility of state and local government as are "fire prevention, police protection, sanitation, public health, and parks and recreation," *National League of*

for low income groups and education for inner city students. Application of FLSA requirements would require redundant payments, leaving the States with "less money for other vital State programs," and would limit their ability to pursue their "social and economic policies beyond their immediate managerial goals." See *EEOC*, 103 S. Ct. at 1063. Of course, to minimize the cost impact of the federal requirements the States could change their scheduling practices, but this would "have the effect of coercing the States to structure work periods in some employment areas . . . in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation." *National League of Cities*, 426 U.S. at 850.

¹² See note 22, *infra*.

Cities, 426 U.S. at 851, and schools and hospitals, *id.* at 855, which, while "obviously not an exhaustive catalogue," *id.* at 851 n.16, this Court has held are "typical" examples of the "numerous line and support activities which are well within the area of traditional operations of state and local governments," *id.*¹³

The provision of a local transportation infrastructure has been an integral function of state and local governments since the earliest days of our Republic. See *Molina-Estrada*, 680 F.2d at 845. With the industrial age and the growth of the nation's urban areas, local streets and roads became inadequate to meet this governmental obligation. Indeed, "[i]n 1905 congested traffic at rush hours was

¹³ While distinctions can be drawn between publicly owned local transit and the activities enumerated in *National League of Cities*, and "[w]hile there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *National League of Cities*, 426 U.S. at 855 (footnote omitted).

Federal appellant attempts to distinguish publicly owned mass transit from the other protected activities by reliance on an early tax case, *Helvering v. Powers*, 293 U.S. 214 (1934), which held that the Trustees of the Boston Elevated Railway Company were not immune from federal income taxation. The activity addressed in that case, however, was the temporary quasi-public operation of a transit system. Furthermore, as Justice Rehnquist stated in his dissent in *Fry v. United States*, 421 U.S. 542, 555 n.1 (1975): "The Court in *Helvering v. Gerhardt*, 304 U.S. 405, 424 (1938), was careful to distinguish between the imposition of a federal income tax on the New York Port Authority, a question which it reserved, and such a tax upon an employee of the Authority, a question which it decided in favor of taxability." See also *Massachusetts v. United States*, 435 U.S. 444, 458-59 (1978) (Brennan, J., concurring); *Graves v. New York*, 306 U.S. 466 (1939).

described as the number one problem of large cities in the United States." W. Owen, *The Metropolitan Transportation Problem* 6 (rev. ed. 1966). As the problems of urbanization increased (e.g., unemployment, congestion, traffic safety, pollution and mobility for students and the elderly) state and local governments increasingly turned to public transit to meet community-wide needs.

Several major cities entered into the provision of publicly owned transit services financed through state and local bond issues or taxes early in this century.¹⁴ In fact, before the enactment of federal legislation to provide financial assistance, more than half of the nation's 21 largest cities provided publicly owned transit services. See *infra* at 27.

By 1978, about 90 percent of transit revenues, total transit miles, total transit vehicles owned and leased, and

¹⁴ See, e.g., C. Thompson, *Public Ownership* 225-26, 240-41 (1925). As early as 1925, this author commented: "So we now have in America not only numerous smaller cities owning and successfully operating municipal street car lines, but three of our larger cities [are also doing so]." *Id.* at 222.

San Francisco started providing local public mass transit service in 1912, Seattle in 1919, Detroit in 1922 and New York City in 1932. Cleveland acquired its public transit system in 1942, and public transit systems serving Boston and Chicago were acquired in 1947. American Public Works Association, *History of Public Works in the United States, 1776-1976* 177 (1976). Los Angeles, San Antonio, and Sacramento were served by publicly owned systems by 1959, J. Moody, *Moody's Transportation Manual* a70 (1960), Oakland by 1960, Memphis by 1961, J. Moody, *Moody's Transportation Manual* a72 (1961), and Miami in 1962, J. Moody, *Moody's Transportation Manual* a78 (1962). Public transit systems serving Long Beach and St. Louis were acquired in 1963, followed by those serving Dallas and Pittsburgh in early 1964, J. Moody, *Moody's Transportation Manual* a60-a61 (1964).

linked passenger trips were attributable to publicly owned mass transit systems. Affidavit of Stanley G. Feinsod accompanying Brief of American Public Transit Association in Support of Motion for Summary Judgment ¶ 4 ("Feinsod Affidavit"); *Transit Fact Book* at 43. Today almost all of the metropolitan areas in the country with a population over 200,000 are served by transit systems owned by state or local government agencies.¹⁵

Moreover, as time has gone on, local governments in rural areas have also responded to this need. By 1981, 248 out of 339 transit operations in non-urbanized areas (73 percent) were publicly owned.¹⁶ The pervasiveness of state and local ownership of public transit is comparable to other traditional governmental functions expressly listed in *National League of Cities*.¹⁷

Thus, as the district court concluded, local publicly owned mass transit is a traditional function of state and local governments. It is the type of public service that the

¹⁵ U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 1-12 (Aug. 1981).

¹⁶ U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service* 13 (Feb. 1981).

¹⁷ The fact that private companies also provide some local transit services cannot be a determinative factor under *National League of Cities*. In 1979, for example, private schools accounted for 20 percent of elementary schools, 19.3 percent of secondary schools, and 56.5 percent of post-secondary schools. U.S. Department of Commerce, *Statistical Abstract of the United States*, Table 214 at 132 (1981) (published annually) ("SAUS: 19xx"). Moreover, in 1974, private firms collected 50 percent of all residential waste and 90 percent of all commercial waste. H.R. Rep. No. 1461, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Ad. News 6323, 6325.

States have determined over many years is necessary to meet their fundamental public welfare obligations in the fulfillment of their "role in the Union." *LIRR*, 455 U.S. at 687. The essential and sovereign character of public transit services has been expressly recognized by state constitutions and legislatures.¹⁸

Appellants contend that because transit has become a pervasively state and local governmental function in recent decades, this activity is somehow disqualified from protection under *National League of Cities*. First, their premise overlooks the fact that publicly owned transit became a widespread, well-recognized state and local function early in the process of urban industrialization and the development of transit technology. Second, any "static historical view" was expressly rejected by this Court in *LIRR*, 455 U.S. at 686, when it clarified that it would "not merely . . . look[] only to the past to determine what is 'traditional.'" *Id.* It stated:

This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal

¹⁸ Examples of state laws decreeing public mass transit to be an essential function of government are considered in *Inman Park Restoration, Inc. v. Urban Mass Transportation Administration*, 414 F. Supp. 99, 104 (N.D. Ga. 1975), *aff'd sub nom. Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Authority*, 576 F.2d 573 (5th Cir. 1978); *Henderson v. Metropolitan Atlanta Rapid Transit Authority*, 236 Ga. 849, 853, 225 S.E.2d 424, 427 (Ga. 1976); *Mass Transit Administration v. Baltimore County Revenue Authority*, 267 Md. 687, 690, 298 A.2d 413, 415 (Md. 1973); *Teamsters Local Union No. 676 v. Port Authority Transit Corp.*, 108 N.J. Super. 502, 507, 261 A.2d 713, 716 (N.J. Super. Ct. Ch. Div. 1970); *County of Niagara v. Levitt*, 97 Misc.2d 421, 422, 411 N.Y.S.2d 810, 812 (N.Y. Sup. Ct. 1978); *Pennsylvania v. Erie Metropolitan Transit Authority*, 444 Pa. 345, 350, 281 A.2d 882, 885 (Pa. 1971).

regulation. Rather it was meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence." *Ibid.*, at 851.

Id. at 686-87 (emphasis supplied). Cf. *First National City Bank v. Banco Para El Comercio Exterior*, 51 U.S.L.W. 4820, 4826 n.27 (U.S. June 17, 1983).

State and local governments in great numbers assumed the responsibility for providing mass transit services and funding them from tax revenues after it became clear that essential community-wide transit services could not be provided profitably in the private sector.¹⁹ States have undertaken this obligation because they regard the maintenance of an urban transportation infrastructure accessible to all residents "as integral parts of their governmental activities," *National League of Cities*, 426 U.S. at 854 n.18, and as "governmental services which their citizens require," *id.* at 847. These services, moreover, are for the benefit of the local community, rather than as part of an integrated network that serves all parts of the country.

¹⁹ *Transit Fact Book* at 27; D. Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 *Indus. and Labor Rel. Rev.* 95, 99 (1971).

APTA is unaware of any publicly owned local mass transit system that does not operate on a deficit basis. Feinsod Affidavit ¶ 6. Fare box revenues constitute only about half of operating costs, with state and local aid providing about 33 percent and federal aid providing about 15 percent of operating costs. *Id.* at ¶ 7. It is beyond doubt that states do not provide transit services to "engag[e] in business activities which have as their aim the production of revenues in excess of costs." See *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 418 n.1 (1978) (Burger, C.J., concurring). Nor did state and local governments assume the responsibility for providing transit services to perpetuate a failing enterprise.

Public transit agencies are organizationally integrated or closely coordinated with other essential local governmental services such as street and traffic management, public works, land use planning and zoning—often under the umbrella of a common city department or regional authority. Feinsod Affidavit ¶ 11. Transit agencies form an important part of a local government budget. *See, e.g., Subway-Surface Supervisors Association v. New York City Transit Authority*, 44 N.Y.2d 101, 111, 375 N.E.2d 384, 389, 404 N.Y.S.2d 323, 329 (N.Y. 1978) (transit system is performing a governmental function because of the “intertwinement” between its finances and the city’s). In order to keep the user charges low enough to serve those in a local community dependent on inexpensive transportation,²⁰ local public mass transit is heavily subsidized with general and special local tax revenues. Feinsod Affidavit ¶ 8. Reduced fares are provided for students and the elderly, *id.* at ¶ 9B, and fares are kept low in the face of rising costs, making transportation accessible to the poor and to low and middle income workers, *id.* at ¶ 9A.

As the district court found, referring to *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979):

Public transit benefits the community as a whole[,] . . . is provided at a heavily subsidized price[,] . . . [and] cannot be provided at a profit [, and therefore is

²⁰ The fact that publicly owned local transit systems charge fares does not convert them into businesses and therefore activities which ought not to be protected under *National League of Cities*. User charges also contribute to the operation of hospitals, parks and recreation, and sanitation. Institute of Public Administration, *Financing Transit: Alternatives for Local Government* 228 (July 1979). Some public schools also charge tuition or user fees. *See Mueller v. Allen*, 51 U.S.L.W. 5050 (U.S. June 29, 1983).

provided] for public service, not for pecuniary gain. [Thus] government is particularly well suited . . . [and, in fact,] is the only component of society that can provide the service.

Finally, government today is the primary provider of transit services.

U.S. J.S. App. 18a-19a. In sum, publicly owned local mass transit falls squarely within the category of activities protected in *National League of Cities*.

III. The Lower Court's Conclusion Is Consistent With *Long Island Rail Road* And Other Recent Decisions Of This Court

In seeking to override the controlling effect of *National League of Cities*, appellants misconstrue subsequent judicial decisions and the relevance of federal funding of local public mass transit.

1. The district court's findings regarding publicly owned local mass transit are fully consistent with this Court's decision in *LIRR*. In upholding the application of the Railway Labor Act to the employees of the state-owned Long Island Rail Road, this Court followed and expressly affirmed its decision in *National League of Cities*. Following a line of prior Supreme Court decisions involving statutes other than the FLSA—*Parden v. Terminal Railway*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *United States v. California*, 297 U.S. 175 (1936)—this Court stated in *National League of Cities* that "the operation of a railroad engaged in 'common carriage by rail in interstate commerce . . .,' " 426 U.S. at 854, n.18 (citation omitted), is not "in an area that the States have regarded as integral parts of their governmental activities," *id.*²¹

²¹ The Court noted in *LIRR* that only two of the seventeen commuter railroads were publicly owned. 455 U.S. at 686 n.12.

Railroads are perhaps unique among state activities because even when publicly owned they still serve as part of the national railroad system and "have been subject to comprehensive [industry-specific] federal regulation for nearly a century." *LIRR*, 455 U.S. at 687 (footnote omitted).²² By contrast, local public mass transit historically has been regulated by state and local governments.²³

This Court further determined in *LIRR* that a state would be eroding federal authority if, by acquiring a small part of the privately-owned national railroad system, it could exempt its employees from federal Railway Labor Act protection. This statement was made, however, in the context of a function, *i.e.* railroads, which:

have been subject to *comprehensive* federal regulation for nearly a *century*. The Interstate Commerce Act—the first *comprehensive* federal regulation of the industry—was passed in 1887. A year earlier we had held that *only* the Federal Government, not the states, could regulate the interstate rates of railroads. . . . The first federal statute dealing with railroad labor relations was the Arbitration Act of 1888.

²² Indeed, federal appellant represented to this Court in *LIRR* that "the *LIRR*, despite the evolving character of its operations, remains a railroad—an integral part of the interstate railroad industry and plainly distinguishable from conventional intraurban transit systems." Brief for United States as Amicus Curiae at 12, *LIRR*, 455 U.S. 678 (1982) (emphasis supplied). As is reflected in the definitions and statutory provisions cited . . . one important attribute of commuter railroads is their genesis as a part of the railroad industry, rather than as a form of intraurban transit." *Id.* at 26 n.19 (emphasis supplied); see also *id.* at 25-27, nn.19-20.

²³ See text accompanying notes 25-28, *infra*. Congress recognized this fact in the FLSA by expressly limiting coverage to those local mass transit systems "[whose] rates and services . . . are subject to regulation by a State or local agency." 29 U.S.C. § 203(r)(2) (1976).

... The Railway Labor Act thus has provided the framework for collective bargaining between all interstate railroads and their employees for the past 56 years. There is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry.

455 U.S. at 687-88 (footnotes omitted) (emphasis supplied). "Moreover, the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system."²⁴ *Id.* The LIRR acceded to this federal regulatory authority for the first 13 years of its ownership by the state, *id.* at 690; it was only in the midst of the cooling-off period during a strike that the state attempted to convert the LIRR's corporate status, "apparently believing that the change would eliminate Railway Labor Act coverage," *id.* at 681.

Local mass transit, in contrast, has always been a local responsibility. There simply is not, and never has been, any comprehensive federal system of law regulating local mass transit. See *Local Division 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 633 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982). State or local laws have dictated, for example, the rates charged users of local transit,²⁵ equipment standards for transit

²⁴ In *LIRR*, the Court stressed that "Congress [had] long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy." 455 U.S. at 688. Under these circumstances, "[t]o allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any other of the elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system." *Id.* at 689.

²⁵ See, e.g., Cal. Pub. Util. Code §§ 211, 216, 451 (West Supp. 1982); N.Y. Transp. Law § 141 (McKinney 1975); Wash. Rev. Code Ann. §§ 81.64.010, 81.64.080 (1962).

vehicles,²⁶ the licensing of drivers of those vehicles,²⁷ and traffic safety rules.²⁸

The statutory history of the FLSA is indisputable. Congress did not even attempt to apply the FLSA to regulate the wages and hours of any private transit employees until 1961. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72. Its first limited attempt to extend these requirements to *public* transit employees (along with employees of public hospitals and schools) was in 1966, and even then Congress specifically excluded most private and public transit employees (*e.g.*, bus drivers) from the hour and overtime requirements. Even after *Wirtz*, when Congress attempted to extend the FLSA requirements to most public agencies, overtime coverage of public and private transit operators was to be phased in; it was not until 1976, only seven years ago, that Congress intended to extend the full reach of federal wage and hour regulation to most local public transit employees. State and local governments began to provide transit services prior to

²⁶ See, *e.g.*, Cal. Pub. Util. Code § 7810 (West 1971); Cal. Veh. Code §§ 26711, 35106, 35250, 35400, 35550-35551.5 (West 1971); Ill. Ann. Stat. ch. 95½ §§ 1-107, 15-102 (Smith-Hurd 1971 & Supp. 1982); N.Y. Veh. & Traf. Law §§ 104, 375, 385 (McKinney Supp. 1981); Wash. Rev. Code Ann. §§ 46.04.320, 46.37.005-46.37.500 (1962 & Supp. 1981).

²⁷ See, *e.g.*, Cal. Veh. Code § 12804 (West 1971 & Supp. 1982); Ill. Ann. Stat. ch. 95½ §§ 1-146, 6-104 (Smith-Hurd 1971 & Supp. 1982); N.Y. Veh. & Traf. Law § 509a-509h (McKinney Supp. 1982); Wash. Rev. Code Ann. §§ 46.20.390, 46.20.440 (1970 & Supp. 1981).

²⁸ See, *e.g.*, Cal. Veh. Code §§ 21000 *et seq.* (West 1971 & Supp. 1982); Ill. Ann. Stat. ch. 95½ §§ 11-100 *et seq.* (Smith-Hurd 1971 & Supp. 1982); N.Y. Veh. & Traf. Law §§ 1100 *et seq.* (McKinney 1970 & Supp. 1982); Wash. Rev. Code Ann. §§ 46.61.005 *et seq.* (1970 & Supp. 1982).

the enactment of the FLSA and well before Congress' attempt to extend it to private or public transit. By the time Congress attempted to apply the overtime provision of the FLSA to any transit system—public or private—the majority of residents of major urban areas was served by publicly owned transit systems, and the majority of transit employees worked for publicly owned systems.²⁹ Furthermore, when Congress or the Department of Labor did act, those actions were challenged in the courts. Therefore, it simply cannot be said that when state and local governments entered this area “they knew of and accepted” the application of the FLSA. *Cf. LIRR*, 455 U.S. at 690. By providing local transit services the states did not “erode federal authority in areas traditionally subject to federal statutory regulation,” *id.* at 687. Rather, here the federal government seeks to extend its power into an activity the States were already conducting and into an area of historic regulation by the “States as employers.” *See Hodel*, 452 U.S. at 286 (quoting *National League of Cities*, 426 U.S. at 841).³⁰

²⁹ By late 1964, 56 percent of transit employees worked for public authorities. *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. 297 (1965)* (testimony of C. Cochran).

³⁰ The court below recognized that:

the FLSA is not a current manifestation of a traditional federal concern for labor relations in the mass transit field. Transit was specifically exempted from coverage from the time of the Act's original passage in 1938 until 1961 amendments subjected private transit operators to minimum wage provisions (but not the overtime pay provisions). Pub. L. No. 75-78, § 13(a)(3), 52 Stat. 1067 (1938); Pub. L. No. 87-30, §§ 2(c), 9; 75 Stat. 65, 66, 72 (1961). Public employers remained entirely exempt until 1966. *Diminution of federal authority resulting from private to public conversions during this period would have been attributable to the statutory exemption and consistent with congressional intent.*

U.S. J.S. App. 7a-9a (emphasis supplied).

The fact that some activities protected by *National League of Cities* were at one time conducted more significantly in the private sector than in the public sector was not relevant to that decision. Private organizations operated 75 percent of hospitals in 1945,³¹ for example, but only 58.4 percent of hospitals in 1980.³² But like local mass transit, and unlike railroads where there is "no comparable history of longstanding state regulation," *LIRR*, 455 U.S. at 688, hospitals are subject to extensive state regulation, including state licensing of hospitals and medical personnel.³³ Likewise, education—including curriculum and teacher licensing, for example—and police and fire protection, are heavily state-regulated. These are functions within the traditional sphere of state responsibility, and nothing in *LIRR* suggests that state acquisition of a private hospital, university or local mass transit system would so erode federal regulatory authority as to deny the State the immunity established by *National League of Cities*. Indeed, appellants would have to concede that there are numerous publicly owned hospitals, recreational facilities, schools and universities, museums and sanitation services that have been acquired from the private sector and are therefore no longer subject to FLSA requirements.

In an attempt to depict an erosion of comprehensive federal regulation, federal appellant cites other federal laws which apply to private local transit. U.S. J.S. at 22-23. But these laws apply equally to the private coun-

³¹ *Hospital Construction Act: Hearings on S. 191 Before the Senate Comm. on Education and Labor, 79th Cong., 1st Sess. 57 (1945) (statement of Dr. T. Parran, Surgeon General, United States Public Health Service).*

³² *SAUS: 1982-83, Table 173 at 112.*

³³ *American Hospital Association, AHA Guide C18-C20 (1982).*

terparts of the activities expressly protected in *National League of Cities*. For example, the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981), regulates private conduct of all the expressly protected activities and transit, but it specifically exempts state and local government employees, including public transit employees. 29 U.S.C. at § 152(2). See *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 23 (1982) ("labor relations between local governments and their employees are the subject of a longstanding statutory exemption from the National Labor Relations Act"). From this fact the district court concluded, "*any diminution of federal authority under the NLRA that results from a private to public conversion is attributable to this statutory exemption, not to the Tenth Amendment, and is consistent with congressional intent.*" U.S. J.S. App. 7a-9a (emphasis supplied). The statutes cited do not establish a *comprehensive* scheme of federal regulation unique to transit labor relations, as, for example, the Railway Labor Act does for railroads. Instead, the cited statutes regulate certain particular employment conditions for virtually all private employers in interstate commerce. In contrast, public employers, including publicly owned transit systems, are generally subject to state collective bargaining laws that govern wages and hours for their employees. U.S. Department of Labor, *Summary of Public Sector Labor Relations Policies* (1981). Finally, the statutes cited, except perhaps the National Labor Relations Act, were enacted after the state and local governments of many of the major metropolitan areas were providing local public transit services. It cannot be said, therefore, that applica-

tion of Tenth Amendment immunity erodes federal authority.³⁴

2. Appellants invoke the straw man of federal funding under the Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1601-1618 (1976) (as amended) ("UMTA"), to shore up their weak argument that the FLSA may be applied to publicly owned local transit. This Court was well aware that the activities protected in *National League of Cities* received substantial federal financial support, see 426 U.S. at 878 (Brennan, J., dissenting), yet the Court nevertheless held that the FLSA could not be applied to them.

Appellants would confuse Congress' Spending Clause powers, which were expressly not addressed in *National League of Cities*, 426 U.S. at 852 n.17, with its Commerce Clause powers, which are limited by the Tenth Amendment. UMTA is a regular federal funding statute, like federal grant programs that assist schools, hospitals, police and fire departments and sanitation.³⁵ Cf. *Penn-*

³⁴ Federal appellant also cites the Equal Pay Act, 29 U.S.C. § 206 (1976 & Supp. V 1981), which was upheld against Tenth Amendment challenge in *Pearce v. Wichita County*, 590 F.2d 128 (5th Cir. 1979). Like *EEOC*, in which the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976) (as amended), was upheld against Tenth Amendment challenge by a state park game warden, *Pearce* involved an employment category, public hospital employees, which with respect to the FLSA was expressly covered by *National League of Cities*. Thus, the fact that some federal labor laws may even apply to traditional governmental functions does not make the particular governmental functions any less traditional for the purposes of the FLSA overtime compensation requirements—which *National League of Cities* held cannot be imposed on the States.

³⁵ The federal appellant states that "[b]y 1978 more than \$13 billion in federal aid to transit had been awarded under the UMT Act and other federal programs." U.S. J.S. at 19 (citation omitted). In the same years, more than \$57.8 billion in federal aid was given to public

hurst State School and Hospital v. Halderman, 451 U.S. 1 (1981). Moreover, unlike the Railway Labor Act directly at issue in *LIRR*, UMTA does not purport to be part of a comprehensive system of federal regulation of local transit, *Local Division 589*, 666 F.2d at 633-34, nor does

elementary and secondary schools alone. This is the sum of the figures for the school years ending in 1965 through 1978 (excluding 1967, for which data are not available). For years 1966, 1970, and 1975-1978, see *SAUS: 1981*, Table 218 at 135; for years 1965, 1968 and 1969, see *SAUS: 1970*, Table 149 at 105; for years 1971 and 1972, see *SAUS: 1972*, Table 157 at 106; for 1973, see *SAUS: 1976*, Table 186 at 117; and for 1974, see *SAUS: 1980*, Table 222 at 141. In 1977 to 1978, the federal government provided \$7.7 billion in aid to public elementary and secondary schools, or 9.4 percent of all such revenue receipts. W. Grant & L. Eiden, *Digest of Education Statistics*, Table 66 at 75 (1982).

Similarly, in 1971 through 1981 the federal government had awarded states \$27.11 billion in sewage treatment construction grants. U.S. Department of the Treasury, *Federal Aid to States* (published annually) ("*FAS: 19xx*"). The \$27.11 billion figure is the sum of the annual figures. See *FAS: 1971* at 4; *FAS: 1972* at 4; *FAS: 1973* at 6; *FAS: 1974* at 5; *FAS: 1975* at 6; *FAS: 1976* at 8, 27; *FAS: 1977* at 6; *FAS: 1978* at 6; *FAS: 1979* at 7; *FAS: 1980* at 10; and *FAS: 1981* at 9.

In 1979, for example, the federal government subsidized local sanitation and sewage with \$3.7 billion, *FAS: 1979* at 7, which accounted for 31.4 percent of total local expenditures of \$11.77 billion on such services. U.S. Department of Commerce, *Environmental Quality Control, Governmental Finance: Fiscal Year 1978-1979*, Table C at 4 (1981).

This compares with only \$2.96 billion provided by the federal government that year for local public mass transit, or 36.6 percent of available funds of \$8.19 billion. *Transit Fact Book*, Table 5 at 46 and Table 19 at 67. The \$8.19 billion includes all transit system revenues, operating subsidies and capital grants. It is assumed *arguendo* that capital outlays were provided in an 80%-20% federal/state ratio, and that all capital grants approved were actually provided.

any such system exist.³⁶ In *Jackson Transit Authority*, 457 U.S. at 27, this Court unanimously held that Congress "did not intend [UMTA] to create a body of federal law applicable to labor relations between local governmental entities and transit workers. Nor does UMTA require fund recipients to comply with the FLSA.

Appellants claim that UMTA funding stimulated the widespread establishment of publicly owned transit services. They are wrong. But, in any event, this does not provide any basis for distinguishing transit from numerous state and local activities within the broad protected areas cited by this Court—for example, sanitation proj-

³⁶ As the Court held in *Jackson Transit Authority*, 457 U.S. 15 (1982), the provision of UMTA that addresses state and local transit employees' collective bargaining rights in, for example, wages and hours—section 13(c)—does not establish any federal rights for employees of transit systems receiving UMTA funds in addition to those rights established by state law. This Court stated:

Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations.

Id. at 27 (footnote omitted).

Jackson Transit Authority sharply distinguished the effect of section 13(c) of UMTA on the federal rights of transit workers from the effect of a federal labor statute on the federal rights of railroad employees. *Id.* at 27 n.9. The Court thus found that the law applicable to local public transit workers was *not* similar to its decision in *Norfolk & Western Railroad Co. v. Nemitz*, 404 U.S. 37 (1971), that "a railroad's employees stated federal claims when they alleged a breach of an agreement entered into by the railroad under § 5(2)(f) of the Interstate Commerce Act," *Jackson Transit Authority*, 457 U.S. at 27 n.9; with respect to transit, the Court determined that section 13(c) of UMTA "addresses 'municipal and State problems, and not Federal problems.'" *Id.* at 28 n.11.

ects such as tertiary treatment plants, educational projects such as Headstart and programs for the handicapped, and health programs such as the health systems planning agencies, that arguably would not even have existed but for federal funding.³⁷ Constitutional immunity cannot rest on the shifting sands of the federal budget process. Moreover, a result that leaves state highway or airport workers under a state compensation scheme and state public transit employees under the federal scheme would be dangerously politically divisive.

Contrary to appellants' contention, moreover, the trend toward public ownership of local mass transit was well established before the enactment of UMTA. Prior to the availability of UMTA funds, the majority of the

³⁷ For example, federal funding of advanced waste treatment facilities began in 1956. The Senate Report on the Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (repealed 1970), refers to "the long period of disregard and neglect that preceded Federal legislation in this field." S. Rep. No. 1367, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3969, 3975. Similarly, comprehensive, statewide health planning was "spotty and fragmented" prior to federal funding of such planning, *see* H.R. Rep. No. 2271, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3830, 3833. *See also* National Health Planning and Resources Development Act of 1974, 42 U.S.C. §§ 300k *et seq.* (1976) (as amended) (*e.g.*, 42 U.S.C. §§ 300l-1, 300l-2 (1976) (specifies structure and functions of local health systems agencies, which may themselves be local governmental units)). For education, in the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(a), 89 Stat. 773, 774, Congress explicitly stated that "State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children." The federal role is to be "a catalyst to local and State program growth." S. Rep. No. 168, 94th Cong., 1st Sess. 5, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1429.

largest urban centers had publicly owned systems. Of the nation's twenty-one largest cities (*i.e.*, with populations in excess of 500,000), twelve were served by publicly owned transit systems by 1964. *SAUS: 1965*, Table 14 at 19-20. There is no doubt that federal aid helped many cities, particularly smaller cities, enhance their direct responsibility for providing transit services as private systems were unable to operate profitably and were unable to satisfy the public welfare obligations that urban transit had assumed.³⁰ But it is simply historical revisionism to imply that state and local governments provide transit services because federal aid enticed them into doing so. Federal grant aid to cities in support of transit services—like federal aid to education, hospitals and law enforcement—simply demonstrates that Congress thought it important that States be able to meet their local public welfare responsibilities in these areas. The passage of UMTA clearly was not intended to encourage the acquisition of private transit systems by public agencies. *See, e.g.*, 49 U.S.C. § 1602(e) (1976); S. Rep. No. 82, 88th Cong., 1st Sess. 19 (1963).

IV. Alternatively, Application Of The Fair Labor Standards Act To Publicly Owned Local Mass Transit After *National League Of Cities* Is Impermissible In The Absence Of A Subsequent Amendment To That Act

Before *National League of Cities* overruled *Wirtz*, Congress extended FLSA requirements to all state and local government agencies, including public transit agencies. *National League of Cities* struck down as unconstitutional most of the intended coverage.

³⁰ "Today nine-tenths of the mounting expenses of city governments are for services that did not exist at the turn of the century—traffic engineering, airports, parking facilities, health clinics, and a long list of others." W. Owen, *The Metropolitan Transportation Problem* 4-5 (rev. ed. 1966).

Despite the presence of a standard severability clause in the FLSA, 29 U.S.C. § 219 (1976), it is not probable that Congress would have intended to enact a law only directed at a small class of public employees if it could not carry out its intent to cover all state and local employees.³⁸ See *Sloan v. Lemon*, 413 U.S. 825, 834 (1973). But cf. *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2775 (1983). Moreover, what remains after severance is not a "fully operative" and "workable administrative machinery." *Id.* Such federal intervention in wage and hour decisions for a small number of state employees and not for others is divisive and may undermine the States' leverage in labor negotiations with its employees not subject to federal law. Therefore, the minimum wage and overtime compensation provisions of the FLSA cannot be applied to publicly owned local mass transit since, even if public transit is not a traditional function, these requirements are not severable from the unconstitutional provisions of the statute. This Court may rely on this alternative argument to grant APTA's Motion to Affirm even though it was not the ground relied on by the lower court. See *Fusari v. Steinberg*, 419 U.S. 379, 387 n.13 (1975).

³⁸ *National League of Cities* eviscerated coverage for what is currently 73 percent of state and local government employees. SAUS: 1982-83, Table 501 at 303.

CONCLUSION

The district court correctly concluded that, like protected activities expressly mentioned in *National League of Cities*, publicly owned local transit services are "important governmental activities," 426 U.S. at 847, which are "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," *id.* at 851 (footnote omitted). Indeed, these are precisely the kinds of public welfare services that "States have traditionally afforded their citizens." *Id.* Since this Court has held, and repeatedly confirmed, that the precise federal regulation at issue here impermissibly interferes with an essential attribute of state sovereignty—the power to fix wages and overtime compensation—and that as such it "endangers [the States'] 'separate and independent' existence," *LIRR*, 455 U.S. at 690 (quoting *National League of Cities*, 426 U.S. at 851), when applied to traditional governmental functions, it follows that publicly owned local mass transit, as a traditional governmental function, is exempt.

Accordingly, this Court should grant APTA's Motion to Affirm.

Only one Justice of this Court has suggested that *National League of Cities* should be overruled. *EEOC*, 103 S. Ct. at 1067 (Stevens, J., concurring). Substantial deprivation of decision-making authority by the hundreds of public agency members of APTA would result if the FLSA were applied to their activities. These public bodies also might be subject to tremendous back-pay and liquidated damage claims. *But cf.*, *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation v. Norris*, 51 U.S.L.W. 5243 (U.S. July 6, 1983). Therefore, should this Court not summarily affirm,

particularly if the reason is that, as appellants discuss, some other lower federal courts have found *contra* to the holding of the court below, APTA respectfully concurs with appellants' suggestion that the question is substantial and the case should be set for full briefing and oral argument on the merits.

Respectfully submitted,

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AUG-80 1983

ALEXANDER L. STEVAS.

No. 82-1913

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Western District of Texas

APPELLANT'S REPLY MEMORANDUM

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1913

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Western District of Texas

APPELLANT'S REPLY MEMORANDUM

The appellees' two motions to affirm, though elaborately argued, maintain almost total silence concerning the decisions in point of the Third,¹ Sixth² and Eleventh³ Cir-

¹ *Kramer v. New Castle Area Transit Authority*, 677 F.2d 308 (C.A. 3), *cert. den.*, — U.S. —, 51 L.W. 3533 (Jan. 17, 1983), hereafter "*Kramer*".

² *Dove v. Chattanooga Area Reg. Transp. Auth. (CARTA)*, 701 F.2d 50 (C.A. 6), hereafter "*Dove*".

³ *Alewine v. City Council of Augusta, Ga.*, 699 F.2d 1060 (C.A. 11), hereafter "*Alewine*."

cuits (see J.S. 7),⁴ each unanimously holding that the Fair Labor Standards Act ("FLSA") may constitutionally be applied to publicly owned and operated mass transit systems. Appellees' inability to provide a reasoned response to those opinions warrants particular notice because that inability not only demonstrates the insubstantiality of their motions for summary affirmance (SAMTA Br. 30, APTA Br. 29), but also reinforces our submission that plenary consideration is unnecessary before reversing the isolated contrary ruling of the court below (J.S. 7-12).

Appellee APTA, which filed a brief in each of the aforementioned cases, cites, but does not discuss them. (APTA Br. 4, n. 6) Appellee SAMTA's treatment, while somewhat less cursory, is equally unsatisfactory.⁵ SAMTA would

⁴ "J.S." refers to our Jurisdictional Statement in No. 82-1913, "SAMTA Br." will refer to the Motion to Affirm of the San Antonio Metropolitan Transit Authority; "APTA Br." will refer to the Motion to Affirm of the American Public Transportation Association.

⁵ Both appellees refer to *Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841 (C.A. 1). That case, however, involved only the application of the FLSA to employees (the plaintiffs therein) who "work on highway construction projects and 'highway upkeep.'" (*Id.* at 842.) The First Circuit decided that these are "traditional" or "integral" government activities" (*id.* at 845):

Certainly governments have built and maintained roads from time immemorial. Let any who doubt the deep-rooted and traditional connections between roads, commerce, communications and society read, for example, V.W. von Hagen, *The Roads That Led to Rome* (1967) or M. Bloch, "Feudal Society" in N. Cantor & M. Werthman, *Medieval Society* 8-11 (1967). [*Id.*]

The constitutional status of public mass transit systems—the operation of motor or rail carriers—was not discussed by the Court in *Molina-Estrada* since the defendant Highway Authority had not exercised its statutory power to operate such a system. SAMTA points to the First Circuit's reliance on *Amersbach v. City of Cleveland*, 598 F.2d 1033 (C.A. 6) (operation of a municipal airport immune under *National League of Cities*), but in *Dove* the Sixth Circuit itself concluded, notwithstanding *Amersbach*, that the FLSA may constitutionally be applied to public mass transit systems. (See 701 F.2d at 52-53). Appellees also fail to acknowledge that *Molina-*

dismiss *Kramer* and *Alewine* on the ground that these decisions "were based on an historical approach, which was eschewed" by this Court in *Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (hereafter "*UTU*"). (SAMTA Br. 5, n. 3.) But *UTU* did not "eschew" an "historical approach"; indeed, the Court there relied on the "historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments." (455 U.S. at 686, emphasis in original.) The *UTU* Court explained that the constitutional concept of "traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a *static* historical view of state functions generally immune from federal regulation." (*Id.*, emphasis supplied). The Third and Eleventh Circuits were entirely cognizant of this Court's approach (see *Kramer*, 677 F.2d at 309, and *Alewine*, 690 F.2d at 1068, each quoting the foregoing passage from *UTU*) and were faithful thereto in their analysis (see 677 F.2d at 309-310, quoted at J.S. 9-11, and 690 F.2d at 1067-1069). SAMTA says also that "*Dove* relied in large part on this Court's denial of certiorari in *Kramer*" (SAMTA Br. 5, n. 3); this characterization of the opinion on the basis of a portion of a footnote (701 F. 2d at 52, n. 3) ignores the Sixth Circuit's careful analysis of the constitutional issue (see *id.* at 51-53).

SAMTA notes also that the Third, Sixth and Eleventh Circuits each relied on federal funding of public mass transportation (SAMTA Br. 5, n. 3); indeed they did, and correctly so. (See J.S. 9-11.) "Massive state involvement with mass transit was *created* by the national government and the states are precluded from claiming, at this date, that mass transit is a service which they *traditionally* provide." (*Kramer*, 677 F. 2d at 310, emphasis in original.).

Estrada and *Amersbach* were both decided before this Court distinguished *National League in Transportation Union v. Long Island R. Co.*, 344 U.S. 678.

SAMTA's *ipse dixit* that this reasoning is "foreclosed" by *Jackson Transit Authority v. Transportation Union*, 457 U.S. 15 is wholly without substance. *Jackson* decided only that a union does not have a right to sue in federal court to enforce an arrangement required by the Urban Mass Transportation Act of 1964 (or of a collective agreement between the union and the transit authority). No constitutional issue was addressed in *Jackson* and neither *National League of Cities* nor *UTU* was mentioned.

The appellees' response that the federal funding of public mass transit pertains exclusively to Congress' powers under the Spending Clause and is irrelevant to Commerce Clause analysis under *National League of Cities* is equally fallacious. (SAMTA Br. 26-27, APTA Br. 23-24.) The Spending Clause cases establish that Congress may, as a condition for funding activities of state and local governments, regulate such activities even though Congress would not otherwise have the power to do so under the Commerce Clause or other provisions of Article I, § 8 of the Constitution. But of course, the existence of such power under the Spending Clause does not *limit* the scope of the other sources of congressional power. As construed in *National League of Cities* and its progeny, in order to invalidate legislation under the Commerce Clause, "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" (*Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 288, quoting *National League*, 426 U.S. at 852.)⁶ Under ap-

⁶ *Hodel* makes clear that a claim of unconstitutionality under this theory must also satisfy two additional tests, not immediately relevant here. (See 452 U.S. at 287-288.) Moreover, "Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission." (*Id.* at 288, n.29.)

pellees' view, activities that have historically been undertaken by private parties (and were thus subject to regulation under the commerce power) are transmuted into "traditional governmental functions" (and immunized from regulation under the commerce power) when federal funds enable state governments to assume the previously private activities. Congressional grants of federal largesse under the spending power are thereby treated as a forfeiture of its authority under the commerce power. Appellees have not, and cannot, square that position with any rational theory of "Our Federalism". The Sixth Circuit was surely right in *Dove* in holding that "where a traditionally private activity has become predominantly a public service due to federal aid", as with public mass transit, the "concerns stated in *National League of Cities* are not implicated." (701 F.2d at 53.)

CONCLUSION

For the reasons stated in the jurisdictional statement and this reply memorandum the decision below should be summarily reversed.

Respectfully submitted,

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Office - Supreme Court, U.S.

FILED

JUL 8 1983

ALEXANDER L. STEVAS
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RAYMOND J. DONOVAN, SECRETARY OF LABOR,

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On Appeal from the United States District Court
for the Western District of Texas

BRIEF FOR THE NATIONAL LEAGUE OF CITIES,
THE NATIONAL GOVERNORS' ASSOCIATION, THE
NATIONAL ASSOCIATION OF COUNTIES, THE
NATIONAL CONFERENCE OF STATE LEGISLATURES,
AND THE INTERNATIONAL CITY MANAGEMENT
ASSOCIATION AS AMICI CURIAE IN SUPPORT OF
A PLENARY HEARING AND AFFIRMANCE
OF THE DECISION BELOW

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QUESTION PRESENTED

Whether publicly-owned and operated mass transit systems are a "traditional governmental function."

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IN THE
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INTEREST OF THE AMICI

The *amici* are organizations which represent state and local governments located throughout the United States. *Amici* and their members have a vital interest in the powers and responsibilities of these governments, and in legal issues affecting such powers and responsibilities.

As pointed out *infra*, issues of profound consequence for the authority and functions of state and local jurisdictions are presented by this case. *Amici* are therefore submitting this brief to assist the Court in its consideration of the questions raised by this litigation.¹

STATEMENT

1. The opinion below is one of several recent lower court decisions on whether a publicly-owned mass transit system is a "traditional governmental function."² This question has repeatedly arisen because an activity must be a "traditional" function in order to qualify for Tenth Amendment immunity under the third prong of the immunity test established by this Court. In its entirety, the third prong is that "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" *EEOC v. Wyoming*, — U.S. —, —, 103 S.Ct. 1054, 1061 (1983).

The lower courts are in conflict on whether mass transit is a traditional function. The court below, and the Court of Appeals for the First Circuit,³ have ruled mass transit is a traditional governmental function. The Third, Sixth and Eleventh Circuits have ruled it is not.⁴

¹ Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

² The opinion below is *San Antonio Metropolitan Transit Authority, et. al. v. Donovan, et. al.*, 557 F. Supp. 445 (D.C.W.D. Tex., 1983).

³ *Molina-Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982).

⁴ *Kramer v. New Castle Area Trans. Auth.*, 677 F.2d 308 (3rd Cir. 1982), cert. den. — U.S. —, 103 S.Ct. 786 (1983); *Dove v. Chattanooga Area Regional Trans. Auth.*, 701 F.2d 50 (6th Cir. 1983); *Alewine v. City Council of Augusta, Ga.*, and *Joiner v. City of Macon*, 699 F.2d 1060 (11th Cir. 1983).

Two of the conflicting cases are presently pending in this Court. They are the present case, in which Jurisdictional Statements have been filed on direct appeal, and *City of Macon v. Joiner*, No. 82-1974, O.T. 1982, in which the petitioner seeks a writ of certiorari directed to the Eleventh Circuit.

2. The court below issued a wide-ranging opinion on whether mass transit is a "traditional" governmental function. It found that "[t]he historical reality of mass transit reveals a long record of state concern and activity in the field." 557 F.Supp. at 448. Prior to today's predominantly public ownership of mass transit, this governmental concern had been expressed through state and city "regulation of fares, routes, schedules, franchising, and safety." *Ibid.* The private ownership previously existing under this regulation, ruled the court, did not negate the fact that today's publicly-owned mass transit systems are a governmental function. *Id.* at 448, 450. The court felt a contrary holding would represent the "'static historical view of state functions'" eschewed by this Court in *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 102 S.Ct. 1349 (1982). *Id.* at 450.

In a section of its opinion dealing with an extensive list of federal statutes, the court held that federal regulatory authority would not be eroded by ruling mass transit to be a governmental function. *Id.* at 448-50. The court pointed out that the statutes are inapplicable anyway (often because of exemptions), are only of recent vintage, or, like clean air laws, will continue to govern.

The court also looked at other relevant factors in determining whether publicly-owned mass transit is a traditional governmental function. It noted that the states and Congress have both recognized that public transportation is an essential state function, *id.* at 451, and it quoted numerous legislative statements showing this congressional view. *Ibid.* It also found that it is "extremely

difficult" to distinguish mass transit from activities this Court has ruled to be traditional governmental functions, *ibid.*, activities such as police protection, fire protection, schools, public health, parks and recreation. In this regard, the court noted that while Congress has made money available to local governments for mass transit, it has also made huge annual amounts available for the other activities. *Id.* at 452. The latter amounts range from hundreds of millions of dollars per year to many billions of dollars per year. *Ibid.*

Finally, the court pointed out that in urban areas mass transit is pervasively supplied by government, which provides it "over 90 percent of the time" when measured by vehicle miles and passenger trips, and "[i]n 230 of . . . 279 urban areas." *Id.* at 453. As well, the court ruled mass transit "benefits the community as a whole," cannot be provided at a profit, is in fact provided at a 75 percent operating loss which is primarily subsidized by state and local taxes, and, in the absence of profit, can only be provided by government. *Ibid.*

REASONS FOR GRANTING A PLENARY HEARING

1. This litigation is one of the two currently pending cases that present this Court with the question whether publicly-owned and operated mass transit systems are a "traditional governmental function." The other pending case is *City of Macon v. Joiner*, No. 82-1974, O.T. 1982. In their brief in support of *certiorari* in *Macon*, *amici* have set forth the reasons why this Court should grant a plenary hearing in the two proceedings. Thus, those reasons will only be summarized here. For a more extensive treatment of them, *amici* respectfully refer the Court to their brief in *Macon*, which can be read in conjunction with this brief.

In summary, the reasons for a plenary hearing are these:

A. The cases present the highly important issue of whether an activity now predominantly conducted by local governments is precluded from being a protected governmental function because it formerly was conducted by private enterprise. If an activity is so precluded, then governmental activities essential to the welfare of millions of citizens will be completely foreclosed from Tenth Amendment immunity against federal regulation. The power of state and local governments to effectively meet the needs of their citizens will be hindered, and the costs encountered by these governments will rise.

B. State and local governments are not static. They change their activities as required by the needs of citizens. In recent decades they have increasingly found it necessary to provide their citizens with a wide range of essential services, including airports, waste disposal facilities, hospitals, nursing homes, utility services, and other necessities of life. State and local governments need to know the circumstances in which their activities will be "traditional governmental functions" eligible for Tenth Amendment immunity. Lower courts have not provided the necessary guidance, and a clarifying decision from this Court is required.

C. There is a direct conflict among the lower courts on whether mass transit is a "traditional governmental function." The conflict exists among the circuits and between circuit court decisions and the opinion below.

D. The decisions holding mass transit is not a protected governmental function are inconsistent with this Court's decision in *United Transportation Union v. Long Island R.R.*, *supra*. This is true both as a factual matter and a legal one. As a factual matter, the commuter railroad services at issue in *Long Island R.R.* were overwhelmingly provided by privately-owned systems, whereas mass transit is overwhelmingly provided by publicly-owned systems. As a legal matter, the decisions holding mass transit is not a "traditional" governmental function have imposed precisely the "static historical view" of state

functions that was explicitly eschewed by this Court in *Long Island R.R.*, 445 U.S. at 686, 102 S.Ct. at 1357.

2. Nothing presented by appellants in this case alters the need for plenary hearing and decision by this Court. Appellants essentially make two arguments not covered in *amici's* brief in *Macon*. They argue, first, that mass transit is not a traditional governmental function because Congress provided some of the money used by local governments in acquiring and operating mass transit systems. Second, they assert that federal regulatory authority would be eroded by holding mass transit to be a traditional governmental function. This alleged erosion is particularly inappropriate, they say, because federal grant monies helped finance local governments' purchase of transit systems.

Neither of these additional arguments provides warrant for holding that mass transit is unprotected by the Tenth Amendment:

A. That Congress provided grants that were used in purchasing and operating mass transit does not prevent publicly-owned mass transit systems from being a protected governmental function. Rather, the congressional grants to local governments illustrate the national legislature's own recognition that it is essential for these governments to provide a vital service indispensable to the daily welfare of millions of their citizens.⁶

⁶ The legislative record of congressional enactments dealing with mass transit contains numerous statements that mass transit is vital to today's society. These statements appear in statutory declarations of policy, in committee hearings and reports, and on the floor of Congress. See, e.g., 49 U.S.C. §§ 1601b(2), 1601b(4), 1601b(5), 1601b(7); H.Rep. No. 204, 88th Cong., 2d Sess., 1964-2 U.S. Code Cong. and Admin. News, pp. 2571, 2572, 2573; see also the congressional statements quoted in the opinion below, 557 F.Supp. at 451.

Furthermore, in its *Jurisdictional Statement* the government properly concedes that by 1964 Congress "had concluded that mass transportation needs have out-stripped the present resources of cities and States," and that a "nationwide program" would "assist

Appellants' argument would vitiate federalism, a result wholly inconsistent with this Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976). Because the federal government's ability to tax and otherwise raise money is vastly superior to that of state and local governments, Congress has felt it necessary to grant the latter scores of billions of dollars annually to enable them to carry out vital activities.⁶ These activities preeminently include ones this Court has held to be traditional governmental functions protected by the Tenth Amendment. As the court below pointed out, in 1979 alone the federal government granted state and local governments almost six billion dollars for education, over fourteen billion dollars for health, more than three and one-half billion dollars for sewage plants, and over one-half billion dollars for the administration of justice. If the use of grant funds were a criterion for assessing whether an activity is a traditional governmental function, these activities could not be protected under the Tenth Amendment, a result directly at odds with *National League of Cities v. Usery*, *supra*. As well, Congress' superior ability to tax and otherwise raise money would be converted into an instrument for injuring federalism by precluding state and local governments from receiving immunity for local activities that are plainly their responsibility.

These untoward consequences are not changed by the federal government's strained argument that mass transit is different from other activities because grant funds were used not only in the *operation* of publicly-owned transit systems, but in *acquiring and constructing gov-*

in solving transportation problems." *Jurisdictional Statement of Appellant Donovan*, p. 18, quoting H.Rep. No. 204, 88th Cong., 1st Sess. 4 (1963).

⁶ It has been estimated that the federal government granted 82.9 billion dollars to state and local governments in 1980. Madden, the *Constitutional and Legal Foundation of Federal Grants*, in *Federal Grant Law* (American Bar Association, 1982), at p. 6, n.3.

ernmentally-owned transit facilities. The fact is that federal grant funds have been used extensively to acquire and construct governmentally-owned facilities for many activities that are protected governmental functions. Beyond this, there is no meaningful distinction for Tenth Amendment purposes between the use of grant funds in acquiring necessary facilities and their use in conducting necessary daily operations. Funds for the adequate daily operation of an activity are as essential to state and local governments as funds for acquiring the requisite capital facilities. A lack of sufficient funds for either purpose would greatly hinder the ability of state and local governments to carry out vital functions.

B. The appellants' argument concerning alleged erosion of federal regulation is no sounder than their argument on grant monies. For as shown by the court below, specific regulation of mass transit has chiefly been regulation by state and local governments, not regulation by the federal government. It has been state and local governments that have regulated entry into the business, fares, routes, schedules and safety.⁷

But even were federal regulation lessened by holding mass transit to be a traditional governmental function, a contrary holding would still be unjustified. Federal regulation is preeminently regulation of private parties, and this Court has made clear that federal regulatory authority can be exercised over private companies where it cannot be exercised over state and local governments. *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 286-287, 101 S.Ct. 2352, 2365 (1981); *National League of Cities v. Usery*, *supra*, 426 U.S. at 845, 855-856, 101 S.Ct. at 2471, 2475-2476 (1976). Thus, that the federal government has regulated private parties who owned mass transit systems does not justify it in

⁷ As said before, the lower court also pointed out that federal laws that could affect mass transit are inapplicable anyway, are only of recent origin, or—as in the case of generalized environmental and other laws that affect a host of activities besides transit—will continue to govern.

regulating local governments when *they* have now become the overwhelmingly predominant supplier of transit services (and have done so to fulfill their governmental responsibility to accommodate vital needs of citizens whom the private parties could no longer serve). Correlatively, a lessening of federal regulation if mass transit is ruled to be a protected governmental function does not justify an opposite ruling.

Nor is any of this changed because federal grants were used by local governments in acquiring transit facilities. For as said earlier, if the use of grant monies made a difference, then grants would gravely harm federalism by precluding Tenth Amendment immunity for local activities that have to be conducted by state and local governments.

CONCLUSION

For the foregoing reasons, this Court should order a plenary hearing in this case and, upon such hearing, should affirm the decision below.⁸

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⁸ As indicated in *amici's* brief in *Macon*, p. 15, a plenary hearing is desirable both in that case and this one. For each case presents certain differing facets of the same problem. Thus *Macon* contains judicial findings showing that an overwhelming percentage of the citizens who use mass transit are dependent upon it, while in the instant case the publicly-owned transit system received UMTA funds from the federal government.

If a plenary hearing is granted in only one of the two cases, the other should be retained on the docket pending the Court's plenary decision.

Nos. 82-1913 & 82-1951

Office - Supreme Court, U.S.

FILED

NOV 28 1983

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QUESTION PRESENTED

May the minimum wage and overtime provisions of the Fair Labor Standards Act constitutionally be applied to employees of a publicly owned and operated mass transit system?*

* The parties to this action are Joe G. Garcia and Raymond J. Donovan, Secretary of Labor of the United States, plaintiffs in the court below and the San Antonio Metropolitan Transit Authority, and the American Public Transit Association, defendants in the court below.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 82-1913 & 82-1951

JOE G. GARCIA,

v.

Appellant,

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

v.

Appellant,

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

**On Appeal from the United States District Court
for the Western District of Texas**

BRIEF OF APPELLANT JOE G. GARCIA

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas is reported at 557 F. Supp. 445 and is reproduced in the Appendix to Appellant Garcia's Jurisdiction Statement in No. 82-1913 (hereafter "J.S.") at pp. 1a-18a. The prior judgment of the District Court, reproduced at J.S. 23a-24a, is not officially reported, but appears at 25 Wage and Hour Cases (BNA) 274.

JURISDICTION

This is a declaratory judgment action instituted by the appellee, San Antonio Metropolitan Transit Authority ("SAMTA"), against the Secretary of Labor, alleging that the minimum wage and overtime provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), may not, by virtue of the Tenth Amendment, constitutionally be enforced against SAMTA. Subject matter jurisdiction is founded on 28 U.S.C. §§ 1331 & 1337.

The judgment of the District Court declaring that the Secretary of Labor may not constitutionally apply or seek to enforce the FLSA against SAMTA or any other local public mass transit system has an effective date of February 14, 1983 and was entered on February 18, 1983. (J.S. 19a-21a.) Appellant Garcia filed a notice of appeal on March 16, 1983. (J.S. 22a.) On April 25, 1983, Justice White entered an order extending the time for filing a Jurisdictional Statement to and including June 1, 1983. On that date Appellant Garcia filed a Jurisdictional Statement invoking the jurisdiction of this Court under 28 U.S.C. § 1252. (See, e.g., *Donovan v. Richland County Assn.*, 454 U.S. 389 (1982).) On October 3, 1983, this Court noted probable jurisdiction in this appeal and in an appeal by the Secretary of Labor from the same judgment (No. 82-1951), and consolidated the cases (— U.S. —, 52 L.W. 3261.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Article I, § 8 of, and the Tenth Amendment to, the Constitution of the United States; and the Fair Labor Standards Act. These constitutional and statutory provisions are reproduced in pertinent part in an appendix to this brief.

STATEMENT OF THE CASE

I. The Factual Background

Prior to May 1, 1959 mass transit service in San Antonio was provided by the San Antonio Transit Company ("SATC"). On May 1, 1959 the City of San Antonio created the San Antonio Transit System ("SATS") and bought SATC. Appellee San Antonio Metropolitan Transit Authority ("SAMTA") became the successor to SATS on March 1, 1978.¹

During its first decade of operations, SATS was a money-making venture whose operations were governed by the terms of a revenue bondholders' indenture.² In 1969, however, the system experienced an operating loss for the first time in its history as F. Norman Hill, general manager of SATS, advised the Subcommittee on Housing of the House Committee on Banking and Currency on March 10, 1970.³

¹ SAMTA is a regional transit authority created pursuant to Tex. Rev. Civ. Stat. Ann. Art. 1118x (Vernon Cum. Supp. 1981) to serve the San Antonio metropolitan area. The City Council of San Antonio created VIA Metropolitan Transit to carry out SAMTA's business. VIA purchased the facilities and equipment of SATS from the City of San Antonio as of March 1, 1978 and commenced operations on that date.

² The National Bank of Commerce of San Antonio, acting as the bondholders' trustee, was the depository for all of SATS' revenues and would release monthly operating funds to the System in accordance with an annual budget. As of March 1, 1978, when SAMTA assumed transit operations, the bonds were paid in full.

³ Mr. Hill, was speaking on behalf of the American Transit Association in support of H.R. 1626. That bill (*see* 116 Cong. Rec. 5785 (1970)) was one of several introduced that session "to provide long-term financing for expanded urban mass transportation programs, and for other purposes." Compare the preamble to the Urban Mass Transportation Act of 1970, P.L. 91-453, which, in part, amended the Urban Mass Transportation Act of 1964, P.L. 88-365, 49 U.S.C. §§ 1601 *et seq.* The significance of that Act for this case is discussed at pp. 17-18, 20-21, *infra*.

Later that year SATS received a capital grant from the Urban Mass Transit Administration in the amount of \$4,122,666.⁴ Over the next 10 years SATS and its successor, SAMTA, received \$51,689,000 in federal capital and operational grants.

II. The Proceedings In This Case

In 1979, in response to a specific inquiry about the applicability of the FLSA to employees of SAMTA, the Wage and Hour Administration of the Department of Labor rendered an opinion "that the operations of the San Antonio Transit System are not constitutionally immune from the application of the Fair Labor Standards Act." (Opinion WII-499, dated September 17, 1979, reprinted in Wage Hour Manual (BNA) 91: 1138-1140.) (See also § 775.3(b) of the FLSA regulations (Code of Federal Regulations, Title 29, Part 775), which includes "local mass transit systems" in a list of "functions of a State or its political subdivision [that] are not traditional" (44 Fed. Reg. 75628).)

On November 21, 1979, SAMTA filed this action for a declaratory judgment against the Secretary of Labor seeking a determination that SAMTA is exempt from the provisions of the FLSA.⁵ SAMTA moved for summary judgment asserting that under *National League of Cities v. Usery*, 426 U.S. 833 (1976), the FLSA "cannot be constitutionally applied to it." Alternatively, SAMTA argued that the *National League of Cities* decision precludes enforcement of the FLSA against any state or

⁴ Project No. TX03005, approved December 23, 1970.

⁵ On that same date appellant Joe G. Garcia, and fellow employees, instituted an action in the district court against SAMTA for overtime pay under the FLSA. (*Garcia v. SAMTA*, SA 79 CA 458.) That suit was stayed pending disposition of the constitutional challenge herein. Garcia was thereafter granted leave to intervene as a defendant in this suit and the American Public Transit Association was permitted to intervene as a plaintiff.

local governmental body in the absence of a congressional reenactment of a constitutionally valid amendment to that Act. The Secretary of Labor thereafter filed a motion for partial summary judgment.

On November 17, 1981, the District Court granted SAMTA's motion for summary judgment, finding that "local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral operations in areas of traditional functions . . . and that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act. . . ." (J.S. 24a.) Consequently, the Department of Labor's classification of a public mass transit system as not constitutionally immune from application of the FLSA (29 CFR § 753(b)(3)) was held to be "null and void." (J.S. 24a.) On January 19, 1982, the District Court stayed, pending an appeal, the portion of its judgment enjoining the Secretary of Labor from applying or seeking to enforce the FLSA against all public mass transit systems in the nation.

Garcia and the Secretary of Labor each appealed to this Court (Nos. 81-1728 and 81-1735). On June 7, 1982, this Court entered an order (457 U.S. 1102) vacating the judgment of the District Court and remanding the case for further consideration in light of *Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (1982).

On remand, the District Court, after receiving briefs from the parties, reaffirmed its original decision and re-entered summary judgment in favor of SAMTA and the American Public Transit Association. (J.S. 1a-18a.)

SUMMARY OF ARGUMENT

The question in this case is whether the Tenth Amendment precludes Congress from requiring state-owned transit systems to comply with the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"). The answer to that question depends on "whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 686-87 (1982) ("*UTU*"). See pp. 9-11, *infra*.

In *UTU*, this Court answered that question in the negative with respect to federal regulation (through the Railway Labor Act) of the employment relationships of a state-owned railroad. The three factors that led the Court to that conclusion in *UTU*, see 455 U.S. at 685-90, are equally applicable here. First, the operation of a transit system is a "business enterprise." Second, it is a type of business enterprise that "has traditionally been a function of private industry, not state or local governments." And third, the States entered the mass transit field "with full awareness that it was subject to federal regulation" and have "operated under federal regulation for . . . years without claiming any impairment of [their] traditional sovereignty." Thus, here, as in *UTU*, it cannot be said that application of the FLSA to public transit systems will threaten the "separate and independent existence" of the States. See pp. 11-12, 14-19, *infra*.

Indeed, in these circumstances to hold that the States are immune from federal regulatory authority would create a powerful incentive for transferring business enterprises from private to public ownership. When transit systems were privately owned and operated those businesses, like all private businesses engaged in interstate

commerce, were subject to federal regulation, including, *e.g.*, the provisions of federal labor law. Those regulations generally impose costs on the operation of private businesses in the interest of achieving other social objectives. If those costs could be avoided by state acquisition of the business it would become economically advantageous, at least in the short run, for the States to acquire and operate private businesses. Yet plainly it was not the intent of the Tenth Amendment to foster a state takeover of the provision of goods and services. See pp. 13, 19-20, *infra*.

There is one additional factor here that makes it especially inappropriate to allow the States' entry into the transit field to defeat federal regulatory authority: the role the federal government has played in promoting that entry. Pursuant to the Urban Mass Transit Act of 1964, 49 U.S.C. §§ 1601 *et seq.* ("UMTA") the federal government has spent over \$18,000,000,000 in financing state acquisition of mass transit systems as well as contributing heavily towards the capital and operating expenses of such systems. Thus, public transit systems are cooperative efforts of the federal government and the States. And, as the Sixth Circuit has stated, "[i]t would indeed be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations." *Dove v. Chattanooga Area Reg. Transp. Auth.*, 701 F.2d 50, 53 (6th Cir. 1983). See pp. 20-21, *infra*.

Finally, the conclusion that federal regulation here will not threaten the "separate and independent existence" of the States accords with the constitutional values at stake. There is a tension between the value underlying the Supremacy Clause—which is protective of federal sovereignty—and the value underlying the Tenth Amendment—which is protective of state sovereignty. The ac-

commodation required by *National League of Cities* and its progeny is to limit federal authority *only* to the extent necessary to preserve the essence of state sovereignty.

State sovereignty is most directly expressed in the State's law-making and law-enforcement powers, not in the State's provision of particular goods and services. Indeed, a State's decision to undertake a particular service—including transit services—ordinarily reflects the play of economic forces which can and do vary from time to time and from place to place. For this reason, it is appropriate to approach with great skepticism any claim that State sovereignty will be compromised by federal regulation of a state-provided service. And where, as in *UTU* and as in this case, the service traditionally has been regarded as a business, performed predominantly by private enterprise, and regulated by the federal government, that activity—when performed by a State—is not an “essential[] of state sovereignty” and is not one to which federal sovereignty must yield. See pp. 22-25, *infra*.

ARGUMENT

THE TENTH AMENDMENT DOES NOT PRECLUDE CONGRESS FROM REQUIRING STATE-OWNED TRANSIT SYSTEMS TO COMPLY WITH THE PROVISIONS OF THE FAIR LABOR STANDARDS ACT.

A. The question in this case is whether the Tenth Amendment precludes Congress from requiring state-owned transit systems to comply with the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"). That question is to be answered by applying the "three-prong test" that this Court has developed for "evaluating claims under *National League of Cities* [*v. Usery*, 426 U.S. 833 (1976)]." *Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 684 (1982) (hereinafter "*UTU*"):

[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged regulation regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." [*Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 287-88 (1981) (emphasis in original) (hereinafter "*Hodel*")], quoted in *UTU*, 455 U.S. at 684. See also *FERC v. Mississippi*, 456 U.S. 742, 763-64 n.28 (1982); *EEOC v. Wyoming*, — U.S. —, 51 L.W. 4219, 4222 (March 2, 1983)]⁶

⁶ Moreover, the *Hodel* Court added:

Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce clause action will succeed. There are situations in which the nature of the federal interest advanced

There is no dispute that insofar as it applies to public single-state transit authorities, the FLSA "regulates the 'States as States.'" Furthermore, *National League of Cities* establishes that the fixing of wages and hours for public employees is "indisputably [an] 'attribute[] of state sovereignty.'" Thus, this case turns on the third inquiry *Hodel* directs: whether it is apparent that federal regulation of the wages and hours of public transit employees "would directly impair th[e States'] ability 'to structure integral operations in areas of traditional governmental functions.'"

By its terms the third *Hodel* factor requires that a line be drawn between "integral operations in areas of traditional governmental functions" and other state operations. The Court has had only one occasion to begin the process of drawing that line—the *UTU* case for which the instant case was remanded for reconsideration. We thus begin our analysis by reviewing that decision's rationale.

B. The question in *UTU* was "whether the Tenth Amendment prohibits application of the Railway Labor Act to a state-owned railroad engaged in interstate commerce." 455 U.S. at 680. That Act provides railroad employees with extensive protections in their dealings with their employers, and places corresponding limitations on the scope of managerial authority to determine unilaterally the terms and conditions of employment for railroad employees—limitations far greater than those imposed by the FLSA whose application had been at issue in *National League of Cities* (and is at issue here). Yet notwithstanding that fact, the Court in *UTU* held that Congress is constitutionally permitted to apply the Railway Labor Act to state-owned railroads. In reaching that conclusion the Court reasoned as follows.

may be such that it justifies state submission. [*Hodel*, 452 U.S. at 288 n.29; see also *UTU*, 455 U.S. at 684 n.9; *FERC v. Mississippi*, *supra*, 456 U.S. at 763-64 n.28; *EEOC v. Wyoming*, *supra*, 51 L.W. at 4222.]

The Court began by explaining that the concern underlying *National League of Cities* is that "federal power to regulate commerce . . . not be exercised in such a manner as to undermine the role of the states in our federal system." 455 U.S. at 686. Given that concern, *UTU* concluded that *Hodel's* focus on "integral operations in areas of traditional governmental functions" is to be understood "to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" 455 U.S. at 686-87, quoting *National League of Cities*, 426 U.S. at 851. Only where the federal regulation would have such an effect is the third prong of the *Hodel* test met and does the Tenth Amendment preclude federal regulation.⁷

In concluding in *UTU* that the test is *not* satisfied with respect to state-owned railroads the Court pointed to three factors. First, the Court noted that in operating a railroad the State is engaged in "the running of a business enterprise":

The *National League of Cities* opinion focused its delineation of the "attributes of sovereignty" . . . on a determination as to whether the State's interest involved "functions essential to separate and independent existence." [426 U.S. at 845] quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911). It should be evident . . . that the running of a business enterprise is not an integral operation in the

⁷ See also *EEOC v. Wyoming*, *supra*, 51 L.W. at 4222 (citations omitted):

The principle of immunity articulated in *National League of Cities* is a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the States enjoy a "separate and independent existence," not be lost through undue federal interference in certain core state functions.

area of traditional government functions. [455 U.S. at 685 n.11, quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 422-24 (Burger, C.J. concurring)]

Second, the Court emphasized that the "operation of passenger railroads" is not just a business enterprise but one that "has traditionally been a function of private industry, not state or local governments." 455 U.S. at 686. The Court recognized that "some passenger railroads have come under state control in recent years," *id.*, but the Court viewed that fact as irrelevant because it

does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state. [*Id.*; emphasis in original]

Finally, the *UTU* Court stressed the long history of "comprehensive federal regulation of the [railroad] industry." 455 U.S. at 687. The Court noted that "[h]ere the State acquired the Railroad with full awareness that it was subject to federal regulation under the Railway Labor Act" and the State "operated under federal regulation for 13 years without claiming any impairment of its traditional sovereignty." *Id.* at 690. Given these facts the Court concluded:

It can thus hardly be maintained that application of the Act to the State's operation of the Railroad is likely to impair the State's ability to fulfill its role in the Union or to endanger the "separate and independent existence" referred to in *National League of Cities v. Usery*, 426 U.S., at 851. [455 U.S. at 690]

It would appear—although *UTU* does not address the issue in terms—that each of the three factors the Court looked to is of independent significance in determining whether federal regulation "would be likely to hamper the state government's ability to fulfill its role in the

Union and endanger its 'separate and independent existence.'" 455 U.S. at 686. For the States' existence is unlikely to be threatened where the federal government regulates a state-owned "business enterprise" or where the federal regulation is of an activity that traditionally has been performed by the private sector or where the federal regulation of that activity is long-standing. In *UTU*, however, all three factors were present. And where that is true, there is an especially powerful reason, suggested in *UTU*, for sustaining the federal regulation.

If a State, by acquiring a private business enterprise were, by virtue of the Tenth Amendment, to gain an immunity from established federal regulatory authority, the Tenth Amendment would create a powerful incentive for transferring business enterprises from private to public ownership. Federal regulation, in the interest of other social objectives, normally imposes costs on the operation of a business, as the instant case and *UTU* both illustrate. If those costs could be avoided by state acquisition of the business, it would become economically advantageous at least in the short run for the States to acquire (using eminent domain powers if necessary) and operate business enterprises free of the federally-imposed costs. Yet plainly, the Tenth Amendment was not intended to encourage a state take-over from the private sector of the provision of goods and services. Thus, as the Court concluded in *UTU*:

Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation. [455 U.S. at 687]

C. The instant case cannot be meaningfully distinguished from *UTU*. For as we proceed to show, state-owned mass transit systems—like state-owned railroads—

are business enterprises that have been traditionally operated by private industry and that have been traditionally subject to federal regulation. For each of these reasons, continued application of the federal regulation to these enterprises—now owned by the State rather than a private party—will not “endanger the States’ separate and independent existence.” And as in *UTU* “there is no justification for a rule which would allow the States, by acquiring functions previously performed by the private sector, to erode federal authority.”

1. At the threshold, the service at issue in this case is remarkably similar to the service involved in *UTU*. In that case, “[b]y far the bulk” of the state-owned railroad’s business was “carrying commuters between Long Island’s suburban communities and their places of employment in New York City.” 455 U.S. at 680 n.1. Here, of course, SAMTA performs a similar function—albeit using buses rather than trains—in the San Antonio metropolitan area; as SAMTA stated in its Motion to Affirm (at 7), “[i]t is estimated that at least two-thirds of all passengers riding SAMTA’s regular-line service buses are travelling to or from school or their jobs.” It would be surprising, indeed, if the Tenth Amendment draws a constitutional distinction between transporting commuters by bus as opposed to by train.

2. *UTU* recognizes that a state-owned commuter passenger railroad no less than any other railroad is a “business enterprise.” 455 U.S. at 686-86. The same is true of all state-owned transit systems. Mass transit operates on a fee-for-service basis; those who cannot afford the fee cannot avail themselves of the service. This means of allocating useful goods and services is, of course, the very hallmark of the market system. This feature distinguishes state-owned mass transit systems from, *e.g.*, state-owned schools, police departments, or fire departments which are public precisely in that each is available to *all* members of the public without regard to economic means. Because mass transit services are sold by

the State rather than delivered—generally in competition with other means of transportation—public mass transit is, in essence, a business. See *Helvering v. Powers*, 293 U.S. 214, 227 (1934). And to repeat the words of *UTU*, “[i]t should be evident that the running of a business enterprise is not an integral operation in the area of traditional government functions.” 455 U.S. at 685 n.11.

We recognize, of course, that transit systems are presently subsidized both by the federal government (*see* p. 20, *infra*) and also by the State governments; approximately 50% of operating costs are now paid by such subsidies.⁸ But the railroad in *UTU* also was state-subsidized and yet was deemed by the Court to be a “business enterprise”; indeed the State had acquired that railroad only after “a period of steadily growing operating deficits,” 455 U.S. at 680, and the record in *UTU* revealed that state subsidies accounted for 50% of the railroad’s gross income, Joint Appendix in No. 80-1925 at 277-78. Furthermore, there are a host of purely private entities that are governmentally-subsidized to a greater or lesser degree (either through direct grants or tax exemptions) but that indisputably are business enterprises (farms provide perhaps the most prominent example). Thus, the existence of state (and federal) subsidies for mass transit cannot defeat the conclusion that this is a business and hence not an “integral operation in the area of traditional government functions.”

3. As in *UTU*, the “historical reality” here, as the District Court found, “is not one of predominantly [*sic*] public ownership and operation of transit services.” J.S.

⁸ Feinsod Affidavit ¶ 7. This is a quite recent development: as of 1970 (by which time public transit was well established, *see* APTA, 1981 *Transit Fact Book* at 48), revenues from fares covered 90% of operating costs. C. Krouse, “Existing Revenue Sources” in American Society of Civil Engineers, *Proceedings of the Speciality Conference on Urban Transportation Financing* at 48 (1979).

4a (emphasis in original). Rather, as appellee American Public Transit Association stated in its 1978-79 *Transit Fact Book* (at 55), “[p]ublic ownership of transit is a recent development.” As of 1940, for example, it was almost as rare for a State to own a transit system such as SAMTA as a commuter railroad such as the Long Island; there were only 20 public transit systems in the entire nation (2% of such systems) and those systems accounted for only 7% of all transit vehicles. As late as 1960, state-owned transit systems still were the relatively infrequent exception rather than the rule; there were only 58 public systems (5% of the total) and those systems accounted for approximately 33% of all transit vehicles. APTA, 1981 *Transit Fact Book* at 43.⁹

In the past two decades, there has been a substantial trend towards state acquisition and ownership of mass transit systems (funded, in substantial part, by the federal government, *see* pp. 17-18, 20, *infra*); the number of publicly-owned systems increased from 58 in 1960, to 159 in 1970, to an estimated 576 in 1980. *Id.* These public systems now account for an estimated 90% of the transit vehicles. *Id.* But as in *UTU* this “recent development” (to quote again from appellee APTA’s *Fact Book*) cannot “alter the historical reality”: the operation

⁹ Notwithstanding *UTU*’s emphasis on the tradition of private ownership in that case, the district court here minimized the significance of the tradition of privately-operated transit systems, emphasizing instead the history of state regulation of transit systems. J.S. 3a-5a. *UTU* cannot be so distinguished, for railroads also have long been subject to state regulation. *See, e.g., Chicago, R.I. & P.R. Co. v. Arkansas*, 219 U.S. 453 (1910) (“full crew” law); *Engineers v. Chicago, R.I. & P.R. Co.*, 382 U.S. 423 (1966) (same); *Smith v. Alabama*, 124 U.S. 465 (1887) (licensing engineers who operate trains within the state); *Nashville, Etc. Railway v. Alabama*, 128 U.S. 96 (1888) (requiring engineers to obtain a certificate of fitness with regard to color-blindness and visual powers); *N.Y., N.H. & H. Railroad v. New York*, 165 U.S. 628 (1896) (regulating the heating systems of passenger cars).

of buses "is not among the functions *traditionally* performed by state and local governments." *UTU*, 455 U.S. at 686.

4. As in *UTU*, the States entered the mass transit field in a substantial way "with full awareness that it was subject to federal regulation" and the States have "operated under federal regulation for . . . years without claiming any impairment of [their] traditional sovereignty." 455 U.S. at 690. The federal regulation of transit systems at the time the States entered this field in large numbers took two discrete forms.

First, in 1964 Congress enacted the Urban Mass Transit Act, 49 U.S.C. §§ 1601 *et seq.* ("UMTA"), which "was designed in part to provide federal aid for local governments in acquiring failing private transit companies." *Jackson Transit Authority v. Transit Union*, 457 U.S. 15, 17 (1982). In enacting that law Congress decided to "protect[] workers affected as a result of adjustments in an industry carried out under the aegis of Federal law." H.R. Rep. No. 204, 88th Cong., 1st Sess. 15 (1963); S. Rep. No. 82, 86th Cong., 1st Sess. 12 (1963). Consequently, § 10(c) of UMTA as originally enacted—now § 13(c), 49 U.S.C. § 1609(c)—imposes certain requirements on UMTA grantees with respect to their employment relationship with transit employees.

In particular, § 13(c) provides that a State that receives UMTA assistance and acquires a transit system, must "protect[] individual employees against a worsening of their position with respect to their employment," and must "continu[e] collective bargaining rights" (even though the National Labor Relations Act as amended, 29 U.S.C. §§ 151 *et seq.*, does not apply to state employees). To this extent § 13(c) requires UMTA grantees, as a matter of federal law, to "accommodate state law to collective bargaining," *Jackson Transit Authority, supra*, 457 U.S. at 28, and thus to surrender what would otherwise be their unlimited managerial authority to fix the

terms and conditions of employment for transit employees.¹⁰

With rare exception, the States have elected to accept UMTA funds and to abide by these federal requirements. As of March, 1982, the Urban Mass Transit Administration had made a total of 2,547 capital grants; at least 382 cities and numerous rural areas—located in every State—have received UMTA funds.¹¹ Simply stated the States chose to enter the transit field with federal assistance, knowing that in so doing they would be subject to federally-imposed requirements.

In addition to UMTA's requirements, in 1966 Congress amended the FLSA, P.L. 89-601, so as to eliminate the "distinction between a public or private local transit

¹⁰ To be sure, as this Court held in *Jackson Transit Authority*, *supra*, § 13(c) does not "create a body of federal law applicable to labor relations between local governmental entities and transit workers" and § 13(c) does not "supersede state law." 457 U.S. at 27. But *Jackson Transit* makes clear that—as explained in text—there are federal obligations imposed by § 13(c) and that there are a variety of means of enforcing § 13(c)'s requirements against UMTA grantees. *See id.* at 29 n.15; *cf. Bell v. New Jersey*, — U.S. —, 51 L.W. 4647 (May 31, 1983).

¹¹ *See Hearings Before the Subcommittee on the Department of Transportation and Related Agencies Appropriations of the House Committee on Appropriations*, 97th Cong., 2d Sess. at 818-20; American Ass'n of State Highway and Transportation Officials, *Survey of State Involvement in Public Transportation* at 32-33 (1982). UMTA funds have been used by transit authorities to purchase 48,891 buses and 4,245 rapid rail transit cars and have been used to construct 311 miles of rapid rail transit track. *Hearings, supra*.

Although we have not been able to find any current data on the number of cities or States that have used UMTA funds to acquire a private mass transit company, as of the end of fiscal year 1975 a total of 115 cities had done so. Department of Transportation, *UMTA Statistical Profile* at Table 10 (1976). Furthermore, "[i]n a number of cities more than one transit property was acquired" with UMTA funding and thus the number of systems so acquired as of 1976 was "considerably higher." *Id.*

system," and provide that "all the employees of a public local transit system which qualifies as an enterprise engaged in commerce [are] covered by the minimum wage . . . provisions of the act." S. Rep. No. 1487, 89th Cong., 2d Sess. at 26-27 (1966). Thus, any State that acquired a transit system after 1966—and over 80% of public transit systems become public after 1966, *see* 1981 *APTA Transit Fact Book* at 43—did so knowing that Congress had manifested its intention to regulate the employment relationship between public transit systems and their employees, and specifically that Congress had made the minimum wage provisions of the FLSA applicable to such systems.

In sum, as in *UTU*, the States "knew of and accepted the federal regulation" in acquiring mass transit systems and have "operated under" that regulation for years. "It can thus hardly be maintained that application of the [FLSA] to the State's operation of [a transit system] is likely to impair the State's ability to fulfill its role in the Union or to endanger the [State's] 'separate and independent existence.'" 455 U.S. at 690.

5. Finally, the ultimate point made in *UTU* is equally applicable here: "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation." 455 U.S. at 687. Until the States entered the mass transit field, the labor relations of transit companies were governed by the National Labor Relations Act; indeed, in *Bus Employees v. Wisconsin Board*, 340 U.S. 383 (1951), this Court specifically upheld the applicability of that Act to mass transit companies. *See also Bus Employees v. Missouri*, 374 U.S. 74 (1963). To hold that State acquisition of transit company ends not only NLRA regulation (because the NLRA, by its terms, does not apply to the States) but also eliminates the federal power to regulate in any respect the employment

relations of such companies would, as previously explained, create an impetus towards state acquisition of private enterprises—an impetus that cannot be attributed to the Tenth Amendment's framers.

There is one additional factor here that makes it especially inappropriate to allow the States' entry into the transit field to defeat federal regulatory authority: the role the federal government has played in promoting that entry. As previously stated, mass transit systems generally were owned and operated by private parties as of 1960 (p. 16, *supra*). In 1964, Congress enacted UMTA and made federal money available for, *inter alia*, state acquisition of private transit companies or state development of transit operations. As the Third Circuit wrote in *Kramer v. New Castle Transit Authority*, 677 F.2d 308 (C.A. 3 1982), *cert. denied*, — U.S. —, 51 L.W. 3533 (Jan. 17, 1983):

The UMTA put inexorable forces in motion whereby, at an accelerated pace, transportation companies changed hands from the private sector to the public sector. . . . The federal government is actively involved in local mass transportation. It provides: (1) capital grants, funded on a "80% federal/20% local" matching basis, (2) operating grants, on a "50% federal/50% local" matching basis; and (3) technical assistance to state and local planning agencies on an "80% federal/20% local" matching basis. [*Id.* at 309-310]

Through UMTA, over \$18,000,000,000 in federal money has been funneled to the States for mass transit. *Hearings, supra* n.11, at 818.

The *Kramer* court drew the following lesson:

[UMTA's] result has been a network of publicly run systems which are cooperations between the federal government and the states. The tradition that has evolved encompasses not only state involvement in local mass transportation but also an important

federal role in the matter. The Authority cannot recast this development as one in which the states took over transit services on their own while the federal government only provided *post hoc* financial assistance. . . . There is . . . no tradition of the states *qua* states providing mass transportation. Moreover, since it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in this area. [677 F.2d at 310, emphasis added, footnote omitted.]

Two other courts of appeals have unanimously agreed with the Third Circuit's reasoning and conclusion. In *Alewine v. City Council*, 699 F.2d 1060, 1069 (C.A. 11 1983) much of the foregoing passage was quoted with approval. And in *Dove v. Chattanooga Area Reg. Transp. Auth.*, 701 F.2d 50 (C.A. 6 1983), the court observed:

In this case, a traditionally private service has become predominantly a public service due to federal aid. *Kramer*, 677 F.2d at 309-10. In such a case, the concerns stated in *National League of Cities* are not implicated. *It would indeed be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations.* [701 F.2d at 53, emphasis added] ¹²

¹² In *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (C.A. 9 1983), the Ninth Circuit followed similar reasoning to conclude that the Tenth Amendment does not bar application of the FLSA to state-employed "chore workers" who were paid through a federal-state program to perform for aged and disabled individuals a wide variety of domestic tasks which "have been traditionally performed by domestic employees in the private sector," *id.* at 1472. That court concluded:

A program that is set up at the behest of the federal government, and that continues to be regulated and funded in large part by the federal government, is unlikely to be a function

D. The parallels between *UTU* and this case are, we believe, sufficient to demonstrate that the result in both cases must be the same. But we venture a few words more on why the constitutional values at stake require that result.

The fundamental premise—the constitutional value—on which *National League of Cities* and its progeny rest is that “[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” 426 U.S. at 844, quoting *Texas v. White*, 7 Wall. 700, 725 (1869). The conclusion drawn from that premise is that “our federal system of government imposes definite limits on the authority of Congress to regulate the activities of the States as States,” 426 U.S. at 842, in order to protect “the States’ ‘separate and independent existence,’” 426 U.S. at 851, quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911). As the Court stated just last Term, “the imposition of certain federal regulations on state governments might, if left unchecked ‘allow “the National Government [to] devour the essentials of state sovereignty.”’” *EEOC v. Wyoming*, *supra*, 51 L.W. at 4222.

It is equally true, however, that “the Constitution, in all its provisions, looks to an indestructible *Union*” based on a federal government whose laws, enacted pursuant to such grants of authority as the Commerce Clause, are by the force of the Supremacy Clause “the supreme Law of the Land.” Consequently, any Tenth Amendment “check” on federal authority necessarily “devour[es]” a part of the federal government’s sovereignty. *National League of Cities*, *Hodel*, and *UTU* resolve this tension by limiting

integral to the state’s “separate and independent existence.” Such a program is, in fact, a joint federal and state undertaking. It is unlike such functions as police protection, control over which is essential to a state’s status as an independent government unit. Federal regulation of the chore worker program through the Commerce Clause poses no significant threat to state sovereignty. [*Id.*]

federal authority *only* to the extent necessary to preserve "the essentials of state sovereignty."

There is, we submit, only one area of state action that is clearly an "essential[] of state sovereignty"—state law-making and law-enforcement. "[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, *supra*, 456 U.S. at 761. "It would follow that the ability of a state legislative (or . . . administrative) body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system." *Id.* Thus, a federal law that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a regulatory program," *Hodel*, *supra*, 452 U.S. at 288, *quoted in FERC v. Mississippi*, *supra*, 456 U.S. at 764-65, is perhaps the clearest example of federal action interdicted by the *National League of Cities* rule.

Law-making and law-enforcement are unique in that the people have granted the government, as their representative, the *exclusive authority* to engage in those activities for the polity as a whole. Government provision of goods and services stands on a very different footing. Neither political theory nor actual practice provides a certain guide as to whether a particular good or service should be or will be provided in whole or in part by the government. Rather, it appears that state provision of a service is more often the product of economic forces that vary from place to place and from time to time than an assertion by the States of their role as sovereigns in the Union.

The precipitous decline of private mass transit and rise of public mass transit makes the point well. These developments do not appear to represent a new understanding of state sovereignty but rather the attraction of relatively low-cost, efficient automobile transportation

(operating on roads constructed and maintained by the government) during relatively affluent times—an attraction that has undermined the competitive position of mass transit in the *current* marketplace. But in a dynamic economy that attraction could well be transient and if so the private sector may again view mass transit as a sound investment. There is, therefore, no reason to believe that the current balance between public and private mass transit will continue of its own force or should to any extent be maintained by an artificial cost advantage accorded to public mass transit.¹³

Similar market forces may at any time lead the States to take on a larger role in the provision or distribution of food, gas, electricity or other necessities of modern life, or a smaller role in providing services that are now “public.” So long as the dictates of the Taking Clause are observed we know of nothing in the Constitution that prevents a State from moving as far along the road to democratic socialism in its best sense as the people of that State determine to go. But because economic considerations have so heavy a weight in such determinations, it is, we submit, appropriate to approach with great skepticism any claim that state sovereignty will be compromised if a state-provided service were subject to federal regulation pursuant to the Commerce Clause

¹³ Mass transit ridership historically has been quite cyclical. In 1926, for example—following a period of sustained growth—mass transit ridership reached 17,201,000,000. Over the next decade, ridership declined by over 25%, bottoming out at 12,645,000,000 in 1938. During the depression and World War II ridership almost doubled, reaching a peak of 23,372,000,000 in 1946. Over the ensuing twenty-five years ridership again declined, this time by almost 70%, falling to 6,972,000,000 in 1975. But in 1975 ridership began to increase again, and as of 1980 was estimated at 8,228,000,000, an increase of over 15% in only five years. See U.S. Dept. of Commerce, *Historical Statistics of the United States From Colonial Times to 1970*, Series Q 235-250 (1976); U.S. Dept. of Commerce, *Statistical Abstract of the United States, 1982-1983* at 623.

whose very purpose is to provide for uniform national regulation of economic activity. And surely, where, as in *UTU* or as in this case, an activity has traditionally been regarded as a business, has traditionally been performed predominantly by private enterprise, and has traditionally been regulated by the federal government, that activity—when undertaken by a State—is not an “essential[] of state sovereignty” and is not one to which federal sovereignty must yield.

CONCLUSION

For the above stated reasons the decision below should be reversed.

Respectfully submitted,

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APPENDIX

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

The Congress shall have power

* * * * *

To regulate Commerce . . . among the several States . . .;

* * * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI, cl. 2:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.*, provides in pertinent part:

29 U.S.C. (& Supp. III) 203:

As used in this chapter—

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor

organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For the purposes of this subsection, the activities performed by any person or persons—

* * * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

* * * *

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

* * * *

(6) is an activity of a public agency.

* * * *

The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce,

or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

29 U.S.C. (Supp. III) 206(a):

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than \$2.65 an hour during the year beginning January 1, 1978, not less than \$2.90 an hour during the year beginning January 1, 1979, not less than \$3.10 an hour during the year beginning January 1, 1980, and not less than \$3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a):

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Nos. 82-1913 and 82-1951

Office - Supreme Court, U.S.

FILED

DEC 5 1983

ALEXANDER L. STEVAS.

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE SECRETARY OF LABOR

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QUESTION PRESENTED

Whether, under the doctrine of intergovernmental immunity recognized in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the minimum wage and overtime provisions of the Fair Labor Standards Act may constitutionally be applied to the employees of a publicly owned and operated mass transit system.

II

PARTIES TO THE PROCEEDING BELOW

In addition to the appellee named in the caption, the American Public Transit Association is an appellee in this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1913

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

No. 82-1951

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The amended opinion of the district court (J.S. App. 1a-20a) is reported at 557 F. Supp. 445.¹ A prior judgment order issued by the district court (J.S. App. 22a-24a) that was vacated by this Court (*Donovan v. San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982)) is unreported.

¹ The district court issued a memorandum opinion and judgment on February 14, 1983, but it withdrew the opinion and judgment on February 18, 1983, and entered an amended opinion and judgment on that date. The court's February 18 order (J.S. App. 21a) recites that the amended judgment shall "be effective as of February 14, 1983." (Unless otherwise indicated, references to "J.S. App." are to the appendix to the jurisdictional statement in No. 82-1951).

JURISDICTION

The amended judgment of the district court (J.S. App. 25a-27a) was entered on February 18, 1983, effective February 14, 1983 (see note 1, *supra*). The federal appellant's notice of appeal to this Court (J.S. App. 28a-29a) was filed on March 3, 1983. Appellant Garcia's notice of appeal (82-1913 J.S. App. 22a) was filed on March 16, 1983. On April 25, 1983, Justice White extended the time for docketing the appeals to and including June 1, 1983. The jurisdictional statements of appellant Garcia and the federal appellant were filed on May 26, 1983, and June 1, 1983, respectively. Probable jurisdiction was noted on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution, the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.*, and the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, are set forth in an appendix to this brief, *infra*, 1a-6a.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. V) 201 *et seq.*, requires covered employers to pay their employees a minimum hourly wage and to pay them at no less than one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week. See 29 U.S.C. (& Supp. V) 206(a)(1) and 207(a)(1).² The original version of the FLSA excluded states and their political subdivisions from the definition of an "employer" used in the minimum wage and overtime provisions; state and municipal employees accordingly were unprotected under these provisions of the Act. See 29 U.S.C. (1940 ed.) 203(d). In

² The Act also proscribes "oppressive child labor." 29 U.S.C. 212(c).

1966, Congress extended the coverage of the FLSA in various respects and eliminated the previously applicable exemption as to virtually all employees of hospitals, institutions, and schools operated by the states and their subdivisions, whether operated for profit or on a non-profit basis, that were deemed to be "[e]nterprise[s]" engaged in commerce or in the production of goods for commerce." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(a), (b), and (c), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(1), 203(s)(4).³ The constitutionality of this "enterprise concept" of coverage and of the inclusion of publicly operated schools, hospitals, and institutions under the Act was sustained in *Maryland v. Wirtz*, 392 U.S. 183 (1968).⁴

In addition to schools, hospitals, and institutions, the 1966 FLSA amendments extended coverage to employees of all transit companies "engaged in commerce" that are either publicly owned or privately owned but subject to state or local regulation. Pub. L. No. 89-601, § 102(a) and (b), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(2). However, the 1966 FLSA amendments did not provide overtime pay protection to drivers, operators, and conductors ("operating employees") employed by transit companies, public or private, brought under the Act. Pub. L. No. 89-601, § 206(c), 80 Stat. 836, 29 U.S.C. (1970 ed.) 213(b)(7).⁵ The plaintiffs in *Mary-*

³ The effect of each of these provisions and their interrelationship is explained in *Maryland v. Wirtz*, 392 U.S. 183, 185-187 & n.4 (1968).

⁴ The Court declined to consider, however, the statutory question whether publicly owned schools, hospitals and institutions characteristically are "engaged in commerce" and are, accordingly, subject to the minimum wage and overtime provisions of the Act, leaving that question open for case by case resolution. *Maryland v. Wirtz*, 392 U.S. at 200-201.

⁵ In 1961, Congress had extended the FLSA to provide minimum wage and child labor (but not overtime) protection to employees of certain private mass transit operators. See Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c) and 9, 75

land v. Wirtz did not challenge the public transit employee provisions of the 1966 FLSA amendments, and the Court had no occasion to consider their validity. See *Maryland v. Wirtz*, 269 F. Supp. 826, 827 (D. Md. 1967), aff'd, 392 U.S. 183 (1968).

In 1974, Congress again broadened the coverage of the FLSA. This time virtually all public agencies and their employees were brought within the ambit of the Act. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §§ 6(a)(1), (4), (5)(D) and (E), and (6), 88 Stat. 58-60, 29 U.S.C. 203(d), 203(r)(3), 203(s)(5), and 203(x).⁶ The 1974 amendments also established a schedule for phasing out the special exclusion from overtime coverage for operating personnel of transit systems that had been established in the 1966 (and 1961) amendments. Pub. L. No. 93-259, § 21(b)(1)-(3), 88 Stat. 68.

The provisions of the 1974 FLSA amendments applicable to public employment generally were broadly challenged by the states and their political subdivisions. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court overruled *Maryland v. Wirtz*, and restricted Congress's power to extend the protections of the FLSA to public employees. The Court held that the "constitutional doctrine of intergovernmental immunity" (*id.* at 837) bars application of the minimum wage and overtime provisions of the FLSA to "the States *qua* States" (*id.* at 847), "insofar as the

Stat. 65-66, 72, 73, 29 U.S.C. (1964 ed.) 203(s)(2), 213(a)(9), 213(b)(7). In 1966, § 203(d) was amended to bring state or local government operated transit systems within the Act's definition of "employer." Section 203(r)(2) was amended in 1966 to make clear that transit operations, whether public or private (but publicly regulated), are "enterprise[s]" within the meaning of the FLSA and, accordingly, that employees of a transit system engaged in commerce are entitled to the protections of the Act.

⁶ These provisions and their combined effect are described in *National League of Cities v. Usery*, 426 U.S. 833, 838-839 (1976).

challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (*id.* at 852).

In overruling *Maryland v. Wirtz*, the Court specified that the publicly operated "schools and hospitals involved in *Wirtz* * * * each provide[] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (426 U.S. at 855 (footnote omitted)). The Court also listed "such areas as fire prevention, police protection, sanitation, public health, and parks and recreation" as other examples of traditional state operations (*id.* at 851, 855). However, the Court did not purport to offer "an exhaustive catalogue of [those] * * * activities * * * which are well within the area of traditional operations of state and local governments" and that accordingly may not be made subject to federal commerce power legislation, where other elements of the test for immunity are satisfied (*id.* at 851 n.16). Because the plaintiffs in *National League of Cities* did not mount a challenge to the public transit provisions of the 1966 and 1974 FLSA amendments, the Court had no occasion to address the constitutionality of those provisions of the Act.

Although the Court thus left unsettled the constitutional validity of federal legislation affecting certain state and local governmental functions, it made clear that not all state activity was insulated from the reach of federal commerce power enactments. Indeed, the Court singled out one activity as outside the scope of the Tenth Amendment's protection: a state's "operation of a railroad engaged in 'common carriage by rail in interstate commerce * * *.'" *National League of Cities v. Usery*, 426 U.S. at 854 n.18 (quoting *United States v. California*, 297 U.S. 175, 182 (1936)). The Court explained that operation of a railroad was not a service "that the States have regarded as integral parts of their governmental activities" (426 U.S. at 854 n.18 (emphasis added)).

On remand for entry of an order implementing this Court's *National League of Cities* decision, the three-judge district court concluded that this Court's decision was "limited to invalidating regulation, under the commerce clause, of the hours and wages of those state and local government employees engaged in activities integral to and traditionally provided by government." *National League of Cities v. Marshall*, 429 F. Supp. 703, 705 (D.D.C. 1977). Recognizing the existence of "a gray area, which will require elucidation in the factual settings presented by future cases" (*id.* at 706), and troubled by the possibility that double damages could be sought against state and local governments for FLSA violations (see 29 U.S.C. (Supp. V) 216(b) and (c)), the court concluded that "[i]t may be appropriate to provide some protection to the state and local governments" (429 F. Supp. at 706).

In response to the district court's request, the Secretary of Labor submitted a proposal to amend his statement of FLSA enforcement policy, 29 C.F.R. Pt. 775, so as to provide for listing of government activities deemed to lie outside the scope of the states' Tenth Amendment immunity from application of the FLSA. The Secretary's proposal also indicated that he would not seek double damages for violations as to any period prior to the listing of a government activity as covered by the Act. The Secretary's proposal was approved by the district court (*National League of Cities v. Marshall*, 429 F. Supp. at 706) and was published as an interpretative rule. See 29 C.F.R. 775.2(b) and (d) and 775.3(b). Pursuant to the approved procedure, on December 21, 1979, the Secretary of Labor amended his statement of enforcement policy to include local mass transit systems in the category of government activities not integral to a traditional government function and hence subject to the FLSA. See 29 C.F.R. 775.3(b) (3).

2. Appellee San Antonio Metropolitan Transit Authority (SAMTA), is a regional transit authority created pursuant to Tex. Rev. Civ. Stat. Ann. art 1118x (Ver-

non Cum. Supp. 1982) to serve the San Antonio metropolitan area. SAMTA began operations on March 1, 1978, when it acquired the facilities and equipment of the city-owned San Antonio Transit System, which had begun operations in 1959.⁷ Prior to 1959 public transportation in San Antonio was provided by a private transit company.

Since its establishment, SAMTA has received substantial federal financial assistance, in the form of grants in aid for capital improvements and operating expenses, as well as technical assistance, under the Urban Mass Transportation Act of 1964 (UMT Act), 49 U.S.C. (& Supp. V) 1601 *et seq.* During the first two fiscal years of SAMTA operations, UMTA provided non-capital grants of approximately \$12.5 million, or 30% of SAMTA's total operating expenses.⁸ SAMTA's predecessor, the San Antonio Transit System, had also received substantial federal financial aid prior to the SAMTA takeover.⁹ During the period December 1970 through February 1980, SAMTA and its predecessors received \$51,689,000 in federal grants, or approximately 40% of their total eligible projects costs of \$130,922,194. Of this federal assistance, \$31,040,080 represented capital grants

⁷ The San Antonio Transit System was operated pursuant to the restrictive terms of a revenue bondholders' indenture with a local bank serving as trustee (J.S. App. 7a n.4; *Urban Mass Transportation: Hearings on H.R. 6663, S. 3154, H.R. 7006 et al. Before the Subcomm. on Housing of the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 420 (1970) (statement of F. Norman Hill, Manager, San Antonio Transit System) (hereinafter cited as 1970 UMT Act Hearings)*).

⁸ Brief in Support of SAMTA's Motion for Summary Judgment 10 (filed Apr. 30, 1980).

⁹ It appears that the system met operating expenses and met its obligations to pay principal and interest on its bonds, to make payments in lieu of taxes to the City of San Antonio, and to establish various reserves, without any federal or local subsidy for the first 10 years of its existence (Aff. of Robert Thompson (June 12, 1980) ¶¶ 4-5 and Exh. A & B thereto; 1970 UMT Act Hearings 420 (statement of F. Norman Hill)).

under Sections 3 and 5 of the UMT Act; \$20,620,270 was operating assistance under Section 5; and \$28,654 was technical assistance (research, development, and demonstration grants) under Section 6 of the UMT Act.¹⁰

3. On November 21, 1979, SAMTÁ filed a complaint in the United States District Court for the Western District of Texas seeking a declaratory judgment that its operations are integral operations of a political subdivision of the State of Texas in an area of traditional governmental functions, and accordingly are exempt, under the rule of *National League of Cities*, from both the minimum wage and overtime provisions of the FLSA.¹¹ The Secretary of Labor counterclaimed against SAMTA for enforcement of the overtime and record-keeping provisions of the Act. See 29 U.S.C. 217.¹²

¹⁰ Urban Mass Transportation Administration, Office of Management Information Systems, List of All Grants for the City of San Antonio, Texas (Feb. 25, 1980) (Exh. K to the federal appellant's motion for summary judgment).

In addition, as of 1979, SAMTA had received federal funding commitments for acquisition of 325 buses. Urban Mass Transportation Administration, Major Funding Commitments for Buses (Over 300 Units) Since Feb. 1965, as of Sept. 30, 1979 (Exh. L to the federal appellant's motion for summary judgment).

¹¹ In its complaint (§§ 4-6), filed just before the Secretary published his enforcement policy respecting mass transit (see page 6, *supra*), SAMTA alleged that the Secretary had informally concluded that mass transit operations were not within the sphere of intergovernmental immunity, and that employees of SAMTA had, on this basis, begun to assert a right to receive overtime compensation under the FLSA and had indicated their intention to seek remedial relief under the Act.

¹² SAMTA evidently paid its employees the minimum wage at the time in question. SAMTA's predecessor, the San Antonio Transit System, had paid overtime pursuant to the FLSA from the time the 1974 amendments to the Act went into effect until October 15, 1976, at which time employees were advised that a "recent decision by the Supreme Court of the United States" made it unnecessary for the System to continue to do so (Aff. of Robert Thompson (June 12, 1980) ¶ 13 and Exh. J thereto).

Appellee American Public Transit Association (APTA), a trade association of public transit operators, intervened as a plaintiff, supporting SAMTA, while appellant Joe G. Garcia, a SAMTA employee, intervened as a defendant, supporting the Secretary.

On November 17, 1981, the district court denied the Secretary's motion for partial summary judgment and entered judgment for SAMTA. The court issued no opinion, but its judgment stated (J.S. App. 23a) that local, publicly operated mass transit systems such as SAMTA "constitute integral operations in areas of traditional governmental functions" for purposes of applying the rule of *National League of Cities v. Usery*. The district court accordingly concluded that the Secretary may not enforce the minimum wage and overtime pay provisions of the FLSA against SAMTA and other public transit operators.

The Secretary and intervenor-defendant Garcia both appealed to this Court pursuant to 28 U.S.C. 1252. The Court vacated the district court's judgment and remanded the case for further consideration in light of the intervening decision in *United Transportation Union v. Long Island R.R.*, 455 U.S. 678 (1982). *Donovan v. San Antonio Metropolitan Area Transit Authority*, 457 U.S. 1102 (1982).

4. On remand, the district court adhered to its conclusion that the minimum wage and overtime provisions of the FLSA may not be applied to publicly owned and operated mass transit systems such as SAMTA (J.S. App. 1a-20a). Although the district court acknowledged that "the historical record is *not* one of predominately [*sic*] public ownership and operation of transit services" (J.S. App. 5a (emphasis in original)), it concluded that mass transit "has traditionally been a state prerogative and responsibility" (*id.* at 6a) because transportation related activities such as road building are a traditional public function (*id.* at 4a) and because private transit operations had generally been subject to state or local regulation (*id.* at 5a).

The district court recognized that, under *United Transportation Union v. Long Island R.R.*, *supra*, the states cannot invoke Tenth Amendment immunity in circumstances where such immunity would "erode federal authority over previously private functions recently converted to public ownership" (J.S. App. 6a). But the court distinguished *Long Island R.R.* on the ground that the FLSA itself had only in recent years been extended to cover transit employees in the public sector (J.S. App. 7a-8a). Because other federal commerce power legislation, the application of which to transit companies antedated that of the FLSA, expressly exempts public employers from coverage, the district court stated that "[n]o * * * federal authority exists to be eroded in the area of transit" (*id.* at 20a; see also 9a-10a).

Finally, the district court concluded that mass transit cannot satisfactorily be distinguished from fire prevention, police protection and other public services classified as traditional state functions in *National League of Cities* itself (J.S. App. 11a-17a). The court rejected (*id.* at 13a-17a) the view that the critical role played by federal grant funds in stimulating and underwriting the conversion of private transit systems to public ownership differentiates the emerging public role in transit operation from traditional state activities for purposes of delineating the scope of state immunity under the FLSA.

SUMMARY OF ARGUMENT

The decision of the district court effects a novel and unwarranted extension of the doctrine of state immunity from nondiscriminatory federal Commerce Clause legislation. As the courts of appeals have unanimously recognized,¹³ the application of the Fair Labor Standards Act

¹³ *Dove v. Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (6th Cir. 1983); *Alewine v. City Council*, 699 F.2d 1060 (11th Cir. 1983), petitions for cert. pending, Nos. 82-1974 and 83-257; *Kramer v. New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), cert. denied, No. 82-701 (Jan. 17, 1983).

to publicly owned transit carriers is constitutionally permissible.

A. In *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), this Court held that the 1974 amendments to the Fair Labor Standards Act, extending the Act's coverage to virtually all state and municipal employees, are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral operations in the areas of *traditional* governmental functions" (emphasis added). While the Court indicated that services such as education and police and fire protection are traditional governmental functions for this purpose and, conversely, that state operation of a railroad is not an immunized function, it did not purport to provide a complete listing of activities falling within (or without) the protected sphere.

In this case, the district court held that local transit service is a traditional government function exempt from application of the FLSA. But that holding is contrary to *National League of Cities* itself, because the historical record shows that until quite recently mass transit, like railroad operation, was a service that the states generally did not undertake to provide. A substantial share of the transit industry remains, even today, in private hands.

The district court did not deny that mass transit historically has been provided by the private sector, with public participation a recent development (see J.S. App. 5a). The court reasoned, however, that immunity should nevertheless be extended to local transit because it is one component of the states' larger transportation systems and because the states have traditionally assumed responsibility for other transportation-related activities, such as road building. This rationale is inconsistent with *United Transportation Union v. Long Island R.R.*, 455 U.S. 678 (1981), for the same could have been said of the commuter railroad involved there. Nor, contrary to the district court's alternative rationale, does a history of state *regulation* of private transit carriers establish mass tran-

sit as an *integral* government operation. On the contrary, the states' historical choice—regulation subject to preemption by federal legislation such as the FLSA, in preference to public operation—confirms that application of federal wage standards to public transit enterprises does not affect basic state prerogatives in a manner that vitiates the essential sovereignty of the states.

B.1. The manner in which the recent growth of the public sector of the transit industry occurred corroborates this conclusion. The shift toward public operation was substantially assisted and encouraged by the enactment of the Urban Mass Transportation Act of 1964, which made available federal grants covering 80% of the cost of acquiring private transit systems or building new systems. Congress enacted the UMT Act in large measure because it determined (based upon the testimony of state and municipal officials and transit operators) that, absent substantial federal financial assistance, many communities would lose all transit service and others would face severe curtailment of service.

The federal funds provided by the UMT Act enabled many states and localities to acquire privately owned systems. Indeed, appellee APTA has acknowledged that in many cities "federal assistance not only improved transit but saved it from extinction." American Public Transit Association, *Transit Fact Book 1981*, at 30. And the Manager of the San Antonio Transit System, predecessor to appellee SAMTA, told Congress in 1970 that "if we do not receive substantial help from the federal government" San Antonio might "end up with no transportation at all" (see pages 31-32, *infra*). Given this critical federal role in the development of the nationwide public transit industry, it would be peculiar indeed to regard the provision of transit service as the kind of core state function that is beyond the reach of federal commerce power regulation.

2. In *Long Island R.R.*, 455 U.S. at 687, the Court held that the intergovernmental immunity doctrine does not permit the states to erode federal commerce power

authority by "acquiring functions previously performed by the private sector." Yet the district court's decision sanctions just such erosion. At the time that large numbers of local governments began to acquire transit systems, employment relations in the transit industry had long been the subject of federal regulation under the National Labor Relations Act. Congress also had extended the FLSA to transit systems prior to the wave of public takeovers following passage of the UMT Act. By choosing to enter the transit industry, public operators subjected themselves to these enactments.

C.1. Even if mass transit were now to be considered a core governmental function, application of the FLSA to public transit systems would not intrude upon state sovereignty. The impact of the transit provisions of the FLSA does not "portend[] anything like the * * * wide-ranging and profound threat to the structure of State governance" (*EEOC v. Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 13) condemned in *National League of Cities*. Moreover, in accepting federal financial assistance for the purpose of acquiring private transit systems, public transit operators agreed to preserve benefits received by the employees from their private employers—which, in the case of much of the industry, included payment of the federal minimum wage. Finally, because collective bargaining agreements in the transit industry generally required payment of overtime, Congress concluded that phasing out the overtime exemption for public transit operating employees in 1974 would not create an undue burden.

2. The federal interest in application of the FLSA to public transit carriers is a powerful one. In enacting the UMT Act, Congress determined that transit service has an important and direct impact on interstate commerce. Congress determined in addition that public transit systems often are in competition with private carriers and that failure to cover public systems under the FLSA would sanction unfair competition. Congress's "determin[ation] that a uniform regulatory scheme" is

required in this area is entitled to substantial deference. *Long Island R.R.*, 455 U.S. at 688.

3. At the time that FLSA coverage was extended to the public sector of the transit industry in 1966, transit was still predominantly a service provided by the private sector. Thus, given the federal interest in regulating interstate commerce and preventing unfair competition, the constitutionality of these provisions could scarcely have been questioned. But if these provisions were valid when enacted less than two decades ago, they cannot be said to intrude impermissibly upon a core area of local governmental functions today. Any adjustment of the FLSA in light of changed social or economic conditions is a task for Congress, not the courts.

ARGUMENT

APPLICATION OF THE FAIR LABOR STANDARDS ACT TO PUBLIC TRANSIT CARRIERS DOES NOT VIOLATE THE TENTH AMENDMENT

"[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality" (*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)) that dictates "deference to * * * congressional judgments" embodied in the legislation "unless * * * demonstrably arbitrary or irrational" (*Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 84 (1978)). In *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), however, this Court held that the 1974 amendments to the Fair Labor Standards Act that extend minimum wage and overtime protection to virtually all public employees are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of *traditional* governmental functions" (emphasis added).¹⁴ As indicated

¹⁴ The Court repeatedly characterized as "traditional" the state activities upon which the federal legislation was deemed impermissibly to intrude. See, e.g., 426 U.S. at 849 ("[t]he degree to

above (page 5), the Court did not purport to provide an "exhaustive catalogue" of local government activities that fall within the protected sphere, but did single out operation of a railroad as a non-exempt activity.

In *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), the Court recapitulated the holding of *National League of Cities*, stating (*id.* at 287-288 (footnote omitted; emphasis in original)):

[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Id.* at 852.

Even where these three requirements are met, a Tenth Amendment challenge to legislation under the Commerce Clause may still fail, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." 452 U.S. at 288 n.29. See also *United Transportation Union v. Long Island R.R.*, 455 U.S. at 684 n.9.

Most recently, in *EEOC v. Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 8-9, the Court emphasized that "[t]he

which the FLSA amendments would interfere with traditional aspects of state sovereignty * * *"), 851 ("services * * * which the States have traditionally afforded their citizens"), 851 n.16 ("activities * * * within the area of traditional operations of state and local governments"), 855 ("those governmental services which the States and their political subdivisions have traditionally afforded their citizens"). See also *id.* at 854 n.18 (operation of a railroad is not "in an area that the States have regarded as integral parts of their governmental activities" (emphasis added)).

principle of immunity articulated in *National League of Cities*" does not create "a sacred province of state autonomy" but instead is a "functional doctrine" tailored to "ensure that the unique benefits of a federal system in which the States enjoy a 'separate and independent existence,' [*National League of Cities v. Usery*, 426 U.S.] at 845 (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)), not be lost through undue federal interference in certain core state functions." The decision of the district court holding the Fair Labor Standards Act unconstitutional as applied to public transit employment is contrary to the limiting principles recognized in these decisions.

A. Operation Of A Transit System Is Not A Traditional Government Function

1. Contrary to the view of the district court (J.S. App. 6a, 11a-17a), provision of mass transit services is distinguishable in critical respects from the "core state functions" such as public education, safety, health, sanitation, parks and hospitals, held to be immune from the operation of the Fair Labor Standards Act in *National League of Cities*. First, mass transit is not a traditional local government function. As the district court acknowledged (*id.* at 5a (emphasis in original; footnote omitted)): "The historical record is *not* one of predominately [*sic*] public ownership and operation of transit services." Similarly, APTA has itself recognized that "[p]ublic ownership of transit is a recent development." American Public Transit Association, *Transit Fact Book* 55 (1978-1979 ed.) (see page 17 note 15, *infra*).

The historical record supports these assessments. Indeed, until the 1960's mass transit had been predominantly performed by the private sector. At the time of World War II, only 20 street railways and bus systems, carrying 7% of the nation's transit riders, were in public ownership. American Public Transit Association,

Transit Fact Book 1981, at 27.¹⁵ Even in 1960, only 64 of the 1251 transit systems extant were publicly owned. *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 27 (1963) (testimony of Robert Weaver) (hereinafter cited as *1963 UMT Act Hearings*). Mass transit then was still a private enterprise in many of the nation's largest cities, including Atlanta, Baltimore, Buffalo, Cincinnati, Dallas, Denver, Houston, Milwaukee, Minneapolis, New Orleans, Pittsburgh, St. Louis, San Diego and Washington, D.C. *Id.* at 313 (testimony of George W. Anderson, Executive Vice President, American Transit Association).¹⁶

To be sure, subsequent to the enactment of the Urban Mass Transportation Act of 1964 (UMT Act), 49 U.S.C. (& Supp. V) 1601 *et seq.*, which made substantial federal funds available to local governments for mass transit construction and operation (see pages 7-8, *supra*, and pages 26-28, *infra*), the trend toward public ownership of transit substantially accelerated. In 1967 over 50% of all transit riders patronized publicly owned systems. *Transit Fact Book 1981*, *supra*, at 27. The latest available information is that slightly over half the operating systems, carrying over 94% of the riders, are now publicly owned. *Ibid.* Even so, as late as 1981, half of the

¹⁵ The 1978-1979 edition of the same reference cites the figure of 35 systems in public ownership, but does not vary the percentage of riders carried. *Transit Fact Book*, *supra*, at 55. We note with interest that APTA, without material revision in the underlying historical data, has revised its assessment of these facts. As indicated above (page 16), the earlier edition of the *Transit Fact Book* concludes that "[p]ublic ownership of transit is a recent development" (*ibid.*). The 1981 edition reverses that judgment, stating: "Public ownership of transit is not a recent development." *Transit Fact Book 1981*, *supra*, at 27.

¹⁶ We note, as well, that until relatively recently many areas had no mass transit, public or private. As of 1963, 60 cities with a population in excess of 25,000 had no such service. *1963 UMT Act Hearings* 330-331 (testimony of George W. Anderson).

nation's urban mass transit systems (336 out of 686) and 91 of 339 systems in rural areas were still privately owned.¹⁷ Moreover, many of the cities that have acquired transit systems in recent years have contracted out responsibility for operation of these systems to private transit management companies, which are in some cases the very companies that previously owned the systems. Of the 350 publicly owned systems in urbanized areas, more than 120 (including some of the larger systems) are privately managed.¹⁸

As these statistics indicate, mass transit cannot be deemed "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (*National League of Cities v. Usery*, 426 U.S. at 855 (footnote omitted)). Accordingly, the application of the FLSA to require fair wage standards in the public transit industry is not precluded by the doctrine of intergovernmental immunity. *Helvering v. Powers*, 293 U.S. 214 (1934),

¹⁷ U.S. Dep't of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 19 (Aug. 1981) (hereinafter cited as *DOT Urban Transit Directory*); U.S. Dep't of Transportation, *A Directory of Regularly Scheduled Fixed Route, Local Rural Public Transportation Service* 13 (Feb. 1981).

¹⁸ *DOT Urban Transit Directory*, *supra*, at 19; Aff. of Alexander Cohn (May 19, 1980), ¶ 4 and Exh. B thereto.

The widespread use of private transit management companies, many of which are actually the direct employers of the transit system employees, is at least partially attributable to the need to reconcile state law prohibitions upon public employee collective bargaining with the mandate of § 13(c) of the UMT Act, 49 U.S.C. 1609(c), which requires recipients of federal mass transit aid under the Act to make "[s]uch protective arrangements * * * as may be necessary for * * * the continuation of collective bargaining rights." See *Local Div. 1285, Amalgamated Transit Union v. Jackson Transit Authority*, 650 F.2d 1379, 1386 (6th Cir. 1981), *rev'd on other grounds*, 457 U.S. 15 (1982); 43 Fed. Reg. 13558 (1978); 1963 UMT Act Hearings 264 (statement of Walter J. McCarter, General Manager, Chicago Transit Authority).

is directly in point. There the Court held that the Board of Trustees of the Boston Elevated Railway Company, a quasi-public street railway enterprise, could not share in the intergovernmental tax immunity of the State of Massachusetts because the transit operation was not a traditional government function (*id.* at 227):

[T]he State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. * * * [These circumstances] cannot be said to furnish a ground for immunity.¹⁹

Nor does the recent trend toward public ownership of local transit services justify extension of state immunity under the FLSA to these services. In *United Transportation Union v. Long Island R.R.*, 455 U.S. 678 (1982), the Court held that the application of the Railway Labor Act to govern labor relations of a state-owned commuter railroad does not trench impermissibly upon state sovereignty. The Court acknowledged that "some passenger railroads have come under state control in recent years" but emphasized that "that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments." 455 U.S. at 686 (emphasis in original). The Court accordingly concluded (*ibid.*):

Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state.

¹⁹ In *National League of Cities*, the Court rejected the contention that "the activities in which the states have traditionally engaged," which had been held to mark the "boundary of the restriction upon the federal taxing power," do not supply a like "limitation upon the plenary power to regulate commerce." 426 U.S. at 854, quoting *United States v. California*, 297 U.S. 175, 185 (1936). But nothing in *National League of Cities* suggests that Congress's power to regulate commerce is *more* limited than the power to tax state activities. See 426 U.S. at 843-844 n.14.

That conclusion is equally applicable to local public transit systems. Indeed, the Court observed:

"[T]here [is] certainly no question that a State's operation of a common carrier, even without profit and as a 'public function,' would be subject to federal regulation under the Commerce Clause"

United Transportation v. Long Island R.R., 455 U.S. at 685 n.11 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978) (opinion of Burger, C.J.)).

Significantly, a key justification for singling out public transit workers for FLSA coverage in 1966, at a time when public employees generally were not within the Act's protection (see pages 2-4 & note 5, *supra*), was to eliminate the unfair competitive advantage that public transit systems had enjoyed over private systems since the latter had been covered by the Act in 1961. Both the House and Senate Reports underscored that public transit systems, even if "not operated for profit,"

are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. *Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which "constitute an unfair method of competition in commerce."*

H.R. Rep. 1366, 89th Cong., 2d Sess. 16-17 (1966); S. Rep. 1487, 89th Cong., 2d Sess. 8 (1966) (emphasis added).

2. The district court acknowledged that mass transit service traditionally has been provided by private enterprise rather than local government (see page 9, *supra*). The court reasoned, however, that other transportation activities such as road building historically were carried out by states (J.S. App. 4a) and suggested that "[m]ass transit is an integral component of a state's transportation system" (*id.* at 5a). But the same could equally have been said of the commuter railroad in *Long Island*

R.R. Plainly, *National League of Cities* does not require that all employment pertaining in any way to any mode of transportation be treated as a single service in determining whether the application of the wage requirements of the FLSA to public transit operations impairs a state's sovereignty (see page 23 note 22, *infra*). And the historical role of government in road building (see *Molina-Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841, 845-846 (1st Cir. 1982)) obviously distinguishes that activity from transit operations.

The district court's alternative rationale for disregarding the lack of a dominant historical tradition of state operation of local transit service was that historic state regulation of local transit service suffices to render mass transit "traditionally * * * a state prerogative and responsibility" (J.S. App. 6a). The court declared (*ibid.*):

That states chose to leave ownership and operation in private hands and to effect their interest through regulation does not negate the inference of sovereignty that arises from history.

This reasoning, which fundamentally misconceives the premise of *National League of Cities*, cannot be reconciled with this Court's decisions. Congress's authority to override state regulation by exercise of its commerce power is well established and is not limited by considerations of state sovereignty. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 289-292. Thus, preemption of state regulatory authority by enactment of the FLSA amendments of 1961, 1966 and 1974 did not run afoul of the Tenth Amendment. Such federal legislation neither "regulates the 'states as states'" (*Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 287 (quoting *National League of Cities*, 426 U.S. at 854)), nor "affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence'" (*United Transportation Union v. Long Island R.R.*, 455

U.S. 686-687 (quoting *National League of Cities*, 426 U.S. at 851) (emphasis added)). Cf. *Bus Employees, Div. 998 v. Wisconsin Employment Relations Board*, 340 U.S. 383, 397-398 (1951).²⁰

A history of state regulation of private transit enterprise simply cannot be regarded as the equivalent of state operation of transit services for this purpose and provides no predicate for treating transit services recently taken over by a public entity as a traditional and essential element of state sovereignty. See *Div. 1287, Bus Employees v. Missouri*, 374 U.S. 74 (1963);²¹ *Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Labora-*

²⁰ In *Bus Employees, Div. 998 v. Wisconsin Employment Relations Board*, 340 U.S. at 397-398, the Court rejected the claim that the substantial local interest in the affairs of a private bus company, operated as a public utility under state regulation, precluded application of the National Labor Relations Act to a labor dispute between the utility and its employees, explaining "these questions are for legislative determination" (*id.* at 397). Thus, contrary to the district court's suggestion (J.S. App. 6a), the states do not enjoy freedom "to select the most suitable means to accomplish their goals in areas of unique and special concern to them" without regard to federal legislation regulating commerce. A similar argument was presented, without success, in *Long Island R.R.* See 80-1925 Resp. Br. 11, 13-14, 27-28. And *EEOC v. Wyoming* expressly rejects the contention that *National League of Cities* artificially delimits any such "sacred province of state autonomy" (slip op. 9).

²¹ In *Div. 1287, Bus Employees v. Missouri*, the Court held that despite seizure of a privately operated local transit company by the governor of the state, the state court's authority to enjoin a strike was preempted by the National Labor Relations Act. Explaining that the seizure did not render the public employment exception to the coverage of the NLRA applicable, the Court observed (374 U.S. at 81):

[T]he State's involvement fell far short of creating a state-owned and operated utility * * *. The employees of the company did not become employees of Missouri. Missouri did not pay their wages, and did not direct or supervise their duties. No property of the company was actually conveyed, transferred, or otherwise turned over to the State. Missouri did not participate in any way in the actual management of the company * * *.

tories, No. 81-827 (Feb. 23, 1983);²² cf. *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-437 (1980) ("The basic distinction drawn in [*Hughes v.*] *Alexandria Scrap [Corp.*, 426 U.S. 794 (1976)] between States as market participants and States as market regulators makes good sense and sound law"); *White v. Massachusetts Council of Construction Employers, Inc.*, No. 81-1003 (Feb. 28, 1983), slip op. 3.²³ On the contrary, the states' funda-

²² In *Jefferson County Pharmaceutical Ass'n*, the Court observed that "[t]he retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty," and declared that such state proprietary activities are subject to federal antitrust laws enacted under the Commerce Clause (slip op. 3 n.6 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 288)). Yet regulation of retail drug sales by private pharmacists (to the extent not preempted by federal law) is assuredly a traditional police power function. See *Whalen v. Roe*, 429 U.S. 589, 596-598 (1977). Plainly, the Court did not regard regulation and direct market participation by the state as interchangeable for purposes of Tenth Amendment analysis. The Court indicated, moreover, that the scope of any Tenth Amendment immunity that might attach to state purchases of drugs for use "in traditional governmental functions" must be closely tailored to the scope of those traditional services. *Jefferson County Pharmaceutical Ass'n*, slip op. 3 & n.6.

²³ The cited cases establish that when the states affect "commercial transactions not as 'regulators' but as 'market participants'" (*White v. Massachusetts Council of Construction Employees*, slip op. 2), they are freed of the special inhibitions the Commerce Clause places upon state "measures impeding free private trade in the national marketplace" (*Reeves, Inc. v. Stake*, 447 U.S. at 437). Our submission in this case is simply that when a state acts in the latter capacity as a participant in the market for transportation services, it necessarily submits itself to the separate restraints that Congress may affirmatively impose upon such market participants pursuant to its plenary power under the Commerce Clause. There is no justification for allowing the states to immunize themselves entirely from the operation of the Commerce Clause by claiming the benefits of acting in the capacity of a market participant without accepting the correlative responsibilities. Indeed, in *Reeves* itself the Court recognized that, notwithstanding the Tenth Amendment and intergovernmental tax immunity doctrines that shield the states, "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private

mental policy decision to pursue their objectives through regulation of nongovernment transit providers rather than direct market participation eloquently testifies that, since the inception of the industry, operation of local transit has "not [been] an area that the States have regarded as *integral* parts of their governmental activities" (*National League of Cities v. Usery*, 426 U.S. at 854 n.18 (emphasis added)).

B. Operation Of A Transit System Is Not A Core Government Function That Must Be Exempted From Federal Commerce Power Legislation To Preserve The States' Independence

As we have noted (see page 19, *supra*), the Court held in *Long Island R.R.* that the "historical reality" of private rather than state operation of common carriers establishes that federal commerce power legislation affecting state or local government owned carriers "does not impair a state's ability to function as a state" (455 U.S. at 685, 686). In light of this holding, the historical evidence recounted above (pages 16-18) dictates that the application of the FLSA to public transit employment must be upheld, without more. But even if further analysis is undertaken, the same result follows.

As appellees emphasize (APTA Mot. to Aff. 13; SAMTA Mot. to Aff. 19-20), in *Long Island R.R.* the Court eschewed a blindly historical test for determining whether particular state governmental functions are entitled to immunity from federal commerce power legislation, stating:

This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regu-

market participants." 447 U.S. at 439 & n.13. It was from this premise that the Court reasoned that "[e]venhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from * * * the inherent limits of the Commerce Clause" upon state regulatory action. *Id.* at 439.

lation. Rather it is meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence."

455 U.S. at 686-687, quoting *National League of Cities*, 426 U.S. at 851. But plainly the Court did not intend to discount the significance of the historical record for this purpose, for the Court's observation that "[f]ederal regulation of a state-owned railroad simply does not impair a state's ability to function as a state" was premised directly upon "the *historical* reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments" (455 U.S. at 686 (emphasis added)). Rather, we take the teaching of *Long Island R.R.* to be that primacy is assigned to historical evidence in the Tenth Amendment analysis because such evidence measures objectively whether a federal enactment unduly interferes with state sovereignty. On the other hand, changing circumstances—such as technological development that makes possible the provision of a service that is genuinely new, rather than merely new to government—may at times warrant characterization of a non-traditional activity as an integral attribute of state sovereignty insulated against Acts of Congress that displace fundamental state decisions. We do not quarrel with the latter proposition. It has no bearing upon this case, however, because, as we have explained, when technology made possible the development of mechanized transit service in the United States, that service emerged under the aegis of private enterprise, and transit typically remained within the private sector for more than a half-century, at least into the 1960's.

Under *Long Island R.R.*, then, a municipal activity that fails to pass the historical test for immunized status may still be the subject of a Tenth Amendment claim. But without the aid of any presumption based upon

historical state responsibility for the service, such a challenge to federal commerce power legislation under the Tenth Amendment must overcome the heavy burden of demonstrating directly that state independence is substantially undermined by application of the federal legislation to the non-traditional state activity. Appellees cannot make such a showing because the circumstances under which the recent growth of public ownership of local transit systems occurred confirm that application of the FLSA to public transit systems does not affect a "core state function" in a manner inconsistent with the separate and independent existence of the states.

1. *The Growth Of Public Transit Service Reflects Cooperative Federalism, Not Independent State Initiatives*

a. The recent conversion of transit systems from private to public ownership was by no means a grass roots or local phenomenon. Rather, that shift was spurred by enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, which made available substantial federal financing for public acquisition of private systems and construction of new systems and facilities. By 1964 Congress had recognized the "deterioration or inadequate provision of urban transportation facilities and services" (49 U.S.C. 1601(a)(2)), and had concluded that "[m]ass transportation needs have outstripped the present resources of the cities and States, and [that] a nationwide program can substantially assist in solving transportation problems." H.R. Rep. 204, 88th Cong., 1st Sess. 4 (1963). As the Court observed in *Jackson Transit Authority v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 17 (1982) (emphasis added):

When the Act was under consideration in the Congress, that body was aware of the increasingly precarious financial condition of a number of private transportation companies across the country, and it feared that communities might be left without ade-

quate mass transportation. See S. Rep. No. 82, 88th Cong., 1st Sess. 4-5, 19-20 (1963). The Act was designed in part to provide federal aid for local governments in acquiring failing private transit companies, so that communities could continue to receive the benefits of mass transportation despite the collapse of private operations. See §§ 2(b) and 3, as amended, 49 U.S.C. §§ 1601(b) and 1602.

The UMT Act established a framework "to provide assistance to State and local governments and their instrumentalities in financing [mass transit] systems, to be operated by public or private mass transportation companies as determined by local needs." 49 U.S.C. 1601(b) (3). Under the provisions of the UMT Act, local government bodies with transit responsibilities are eligible to receive federal grants defraying 80% of their capital outlays, including the costs of acquiring local private systems and making capital improvements and the costs of building new facilities from scratch, as well as up to 50% of their operating expenses. 49 U.S.C. (& Supp. V) 1603(a), 1604(e).²⁴

Substantial federal aid has been provided to local public transit systems pursuant to the UMT Act. By 1978 more than \$13 billion in aid had been awarded under the UMT Act and other federal programs. *Transit Fact Book* 57 (1978-1979 ed.). In fiscal year 1980 alone, \$3.9 billion was provided, including 498 operating assistance grants totalling \$1.12 billion. *Transit Fact Book 1981*, *supra*, at 67 (table 19), 68 (table 20). Nationwide, federal revenues covered 17.3% of all operating expenses of public transit systems in 1980, 30.2% of all subsidies for farebox revenues. *Transit Fact Book 1981*, *supra*, at 29, 30. More strikingly, as APTA has acknowledged, "[a]lmost all transit capital revenue is * * * received from

²⁴ Authorization for operating expense subsidies was provided by § 103 of the National Mass Transportation Assistance Act of 1974, Pub. L. No. 93-503, 88 Stat. 1568, which revised § 5 of the UMT Act, adding § 5(d) (1) and (e) thereto, 49 U.S.C. 1604(d) (1) and (e).

government agencies." *Id.* at 29. Thus, in 1980 alone, "the federal government contributed 2.8 billion dollars toward the purchase of transit capital equipment" while state and local governments apparently contributed only the statutory matching share required by federal law as a condition of the award of federal assistance. *Ibid.*; see 49 U.S.C. 1604(e). Federal capital grants exceeded \$2 billion annually in fiscal 1978 and 1979. *Transit Fact Book 1981, supra*, 67 (table 19).²⁵ As indicated above (pages 7-8), both SAMTA and its predecessor, the San Antonio Transit System, were beneficiaries of large amounts of federal financial assistance.

The enactment of the UMT Act in 1964 heralded the substantial expansion of the state and local governmental role in providing urban transit described above (pages 17-18). Although it is impossible to state with assurance what would have happened had federal funding not been made available, there is reason to believe that many cities would not have entered the transit business; certainly they had not generally undertaken to perform that service before the advent of federal financing. As the Court noted in *Jackson Transit*, 457 U.S. at 17, it was Congress's conclusion that absent a dramatic infusion of federal funds many communities would simply lose all local transit service. Indeed, the Senate Report highlighted statistics compiled by the American Transit Association reflecting that at least 194 privately operated local transit systems had been abandoned in the nine year period following January 1, 1954, and emphasized the multiple problems caused by abandonment of transit systems and transit rights-of-way. S. Rep. 82, 88th Cong., 1st Sess. 4-5 (1963). The House Report was similarly concerned

²⁵ According to APTA, equipment and facilities funded with capital assistance from the federal government during the period 1964-1980 included: 42,692 motor buses, 678 trolley coaches, 3,218 heavy rail cars, 497 light rail cars, 1,720 commuter railroad cars, 96 commuter railroad locomotives, and 16 ferry boats, plus over 250 miles of rail lines (not counting mileage or entire systems as yet in the planning stage). *Transit Fact Book 1981, supra*, at 30.

with "abandonment of individual lines or entire systems in some communities" (H.R. Rep. 204, *supra*, at 4), and predicted that without enactment of the proposed bill "additional essential rights-of-way undoubtedly will be abandoned" (*ibid.*).

The statements of local officials and industry representatives indicate that they shared Congress's apprehension that if federal assistance was not forthcoming widespread curtailment, deterioration and abandonment of mass transit service would result. Governor Peabody of Massachusetts informed Congress:

[W]e are fully aware of the dire straits and consequent need for improvement of public transportation in the smaller urban portions of the Commonwealth as well as in the Greater Boston area. The private bus industry is clearly in grave financial difficulty and many communities outside of the core Boston area have already lost or are in danger of losing what public transportation facilities they now possess.

1963 UMT Act Hearings 91. Governor Peabody frankly acknowledged the dependency of the states upon federal assistance to carry out an essential program of modernization and expansion of existing facilities (*ibid.*):

We also know that just as we would have been incapable of carrying out our highway program without the assistance of 90-10 and 50-50 Federal grants, we cannot make the proper capital investment in public transportation facilities without some similar Federal assistance.

The director of the Atlanta Region Metropolitan Planning Commission, which was then planning to construct a new rapid transit system, made clear that such new systems had an equally pressing need for federal assistance:

[I]t is generally assumed in Atlanta that the achievement of a completely balanced transportation system cannot be attained without a balanced Federal aid program for transportation * * *.

It is clear that the magnitude of the initial public expenditures necessary for rapid transit will make it very difficult for the local governments. Without Federal aid, rapid transit will be realized only in the distant future.

1963 UMT Act Hearings 398 (statement of Glenn E. Bennett). The American Transit Association presented a compilation reflecting that more than 100 cities had lost all mass transit service because of abandonment of private systems in the period following 1954. *Id.* at 316-329. Other witnesses agreed that absent federal aid many systems would be abandoned, leaving the cities formerly served totally without service, while other systems would progressively decline, offering extremely limited and unattractive service.²⁶

Events in the aftermath of the enactment of the UMT Act strongly suggest the substantial difference made by the availability of federal funds for municipal acquisition of existing transit systems or creation of new ones. Whereas on the eve of the adoption of the UMT Act only 5% of all existing transit systems were publicly owned, after a decade and a half of massive federal assistance to states and local governments roughly half of the operating systems in urban areas had passed into public ownership. See pages 17-18, *supra*. As early as September 1976, some 115 cities had employed UMT Act funds to acquire local private bus systems. F. Siskind and E. Stromsdorfer, *The Economic Cost Impact of the Labor Protection Provisions of the Urban Mass Transit Act of 1964*, at 9-11 (May 1978). Moreover, transit operators

²⁶ *1963 UMT Act Hearings* 93 (Joseph F. Maloney, Director, Massachusetts Mass Transportation Commission), 190 (W. Elmer George, Director, Georgia Municipal Association), 193 (Adrien J. Falk, Chairman, San Francisco Bay Area Transit District), 204-206 (W.P. Coliton, President, Chicago South Shore & South Bend R.R.), 248 (Otto Kerner, Governor of Illinois), 295, 297, 299, 302 (Richard L. Lich, Railway Progress Institute), 314, 330 (George W. Anderson, Executive Vice President, American Transit Association), 339-340 (A.L. de Mayo, Treasurer, American Transit Corp.), 377 (James W. Symes, Chairman, Pennsylvania R.R.).

have frankly acknowledged the critical role played by federal grant assistance. For instance, in *Alewine v. City Council*, 699 F.2d 1060, 1063 (11th Cir. 1983), petitions for cert. pending, No. 82-1974 (filed June 3, 1983) and No. 83-257 (filed Sept. 9, 1983), the City of Augusta, Georgia, "stipulated that had it not been for the federal grant it would not have purchased the assets of the Augusta Coach Company." And APTA itself has acknowledged that federal funds were

used by many cities [during the 1960's] to buy the vehicles and facilities owned by private transit systems that were on the verge of bankruptcy. *In those cities federal assistance not only improved transit but saved it from extinction.*

Transit Fact Book 1981, supra, at 29-30 (emphasis added). The Court described an example of this pattern in *Jackson Transit*, 457 U.S. at 18:

In 1966, petitioner city of Jackson, Tenn., applied for federal aid to convert a failing private bus company into a public entity, petitioner Jackson Transit Authority.

The history of public transit in San Antonio is no exception to the general pattern. SAMTA did not enter into operations until long after the enactment of the UMT Act, and has received the benefit of extensive federal capital and operating assistance. Although appellee's predecessor, the San Antonio Transit System, was created before the era of federal funding, when it became unable to cover its costs from the fare box it, too, was the beneficiary of substantial federal assistance. See pages 7-8, *supra*. In 1970 the General Manager of the San Antonio Transit System explained to Congress the likely consequences if federal aid were not made available:

[I]f we do not receive substantial help from the Federal Government, San Antonio may drop out of th[e] small list of public authorities * * * who are paying their own way out of revenues from the fare

box and join the growing ranks of cities that have inferior transportation or may end up with no transportation at all.

Urban Mass Transportation: Hearings on H.R. 6663, S. 3154, H.R. 7006 et al. Before the Subcomm. on Housing of the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 419 (1970) (statement of F. Norman Hill).

The federal role in mass transit was not limited to underwriting the substitution of public agencies for private transit companies, modernization of existing systems and creation of new transit systems. Prior to the enactment of the UMT Act, "[a]s suburban development increased, the tendency was for each community to maintain its political and fiscal individuality and shun comprehensive urban transportation planning." American Public Works Association, *History of Public Works in the U.S. 1776-1976*, at 178 (1976); see also *1963 UMT Act Hearings* 92 (statement of Richard Sullivan); *id.* at 94 (statement of Joseph F. Maloney). The UMT Act, however, was intended to "encourage the planning and establishment of *areawide* urban mass transportation systems." 49 U.S.C. 1601(b)(2) (emphasis added). Congress made funding available for a project only if it was designed as part of a comprehensive areawide plan, meeting federal criteria for improved transportation, and provided that grants could only be made to public agencies that had the legal and financial authority to carry out such projects. See 49 U.S.C. (Supp. V) 1602(a)(2)(A), 1604(b), 1604(g), and 1607; H.R. Rep. 204, *supra*, at 14. By means of these requirements, local governments were induced, in many instances for the first time, to band together and to create metropolitan transit systems spanning the entire urban area.²⁷ Thus, far from being in-

²⁷ SAMTA was created in 1978, to serve Bexar County, Texas, pursuant to Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Cum. Supp. 1982), which authorized creation of metropolitan area-wide transit authorities. Article 1118x was first enacted in 1973.

tegral to the functioning of state and local governments, the very shape of transit systems as they exist today reflects the imprint of *federal* policy.

The transfer of responsibility for providing local transit service thus established not a new integral aspect of state or local government, but a classic venture in "cooperative federalism." See *FERC v. Mississippi*, 456 U.S. 742, 764-767 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 289. Given the critical role played by the federal government in the development of a nationwide public transit industry, it can hardly be claimed that, although non-traditional, operation of local transit by the states and their subdivisions has become a "core state function" that cannot be subjected to federal legislation establishing fair minimum wage standards without destroying the states' "separate and independent existence." Compare *EEOC v. Wyoming*, slip op. 9; *United Transportation Union v. Long Island R.R.*, 455 U.S. at 686-687. As the Sixth Circuit has remarked: "It would indeed be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations." *Dove v. Chattanooga Area Regional Transportation Authority*, 701 F.2d at 53.

b. The district court concluded that federal funding is irrelevant to the question of intergovernmental immunity (J.S. App. 13a-16a). The court below reasoned that: (1) federal subsidies are an exercise of Congress's Spending Power rather than its Commerce Clause authority, (2) federal monies support many of the functions treated as core aspects of sovereignty in *National League of Cities*, and (3) federal funding, because variable, cannot measure the extent of a state's Tenth Amendment immunity. Appellants have echoed these themes (APTA Mot. to Aff. 23-27; SAMTA Mot. to Aff. 12-14, 24-27). But these observations do not support the decision below.

1. It is immaterial that federal wage legislation respecting mass transit does not itself rest upon Congress's

Spending Power. Federal funding is pertinent in this case not because it supplies the constitutional basis for imposing conditions directly upon the states, but simply because the extensive involvement of the federal government in the growth of public transit is a historical fact that indicates that mass transit—even though it has shifted partly into the public sector—still is not a “core state function” that must be shielded from the federal minimum wage and overtime laws in order to preserve the states’ “*separate and independent existence*” (*National League of Cities v. Usery*, 426 U.S. at 851 (emphasis added)).

2. The role played by federal funding and other requirements of federal law in the public transit industry is significantly different from that of federal grants supporting certain traditional local government functions. To be sure, federal monies are available for education, public safety, and public health activities undertaken by the states. But the federal share of total local expenditures in those areas is generally far less significant than the federal share of expenditures in public transit, particularly in respect to capital costs. For instance, while the federal government typically supplies 80% of all capital construction and facility acquisition costs for public transit, and has supplied a larger share of operating subsidies than state government in many recent years (see *Transit Fact Book 1981*, *supra*, at 29), “[t]he Federal Government has traditionally played a limited role in financing education” (*Budget of the U.S. Government Fiscal Year 1984*, H. Doc. 98-3, 98th Cong., 1st Sess. 5-86 (1983)). Federal funds provide less than 10% of all revenues for public elementary and secondary schools. See, e.g., Bureau of the Census, *Statistical Abstract of the U.S. 1982-83*, at 156 (table 252); Bureau of the Census, *Statistical Abstract of the U.S. 1980*, 161 (table 263). Moreover, while public education had a venerable tradition in the United States by the time of en-

actment of the Fair Labor Standards Act in 1938, federal aid to education constituted only a bit more than 1% of all revenues for public elementary and secondary education in that year. Bureau of the Census, *Historical Statistics of the U.S.*, Pt. 1, 373 (series H 486, 488) (1975) (*Historical Statistics*). In 1918, the earliest date for which federal aid to local education is recorded by the Census Bureau, federal aid was .2% of local school revenues. *Ibid.*²⁸

More important, though, than the high level of federal financial assistance to public transit operations is the special role that federal assistance played as a catalyst in the conversion of transit systems from the private to the public sector in many localities. See pages 28-32, *supra*. Neither the district court nor appellees have suggested that federal assistance played even a remotely comparable role respecting any of the other activities recognized as traditional state and local government functions in *National League of Cities*. On the contrary, police and fire protection, public education and public hospitals were provided by municipalities long before federal aid became available. We may therefore conclude that such services indeed are "functions such as th[o]se which [state and local] governments are created to provide" (*National League of Cities*, 426 U.S. at 851). By contrast, history shows that transit is not within the unique competence or responsibility of local governments,

²⁸ Similarly, while \$716 million was earmarked for federal law enforcement assistance to local governments in the 1977 budget, *National League of Cities*, 426 U.S. at 878 (Brennan, J., dissenting), state and local government criminal justice system expenditures in that year totalled \$18.8 billion. *Statistical Abstract of the U.S. 1980, supra*, at 192 (table 324). In 1938, federal expenditures for policing activities (the bulk—if not all—of which was presumably direct federal expenditures rather than aid to states) totalled \$19 million, whereas state and local government expenditures were \$359 million; in 1902 federal policing expenditures were negligible whereas local governments spent \$50 million on law enforcement. *Historical Statistics, supra*, at 416 (series H 1013, 1017, 1021, 1025).

but is a service that many states were either unwilling or unable to provide absent substantial federal funds. The UMT Act itself is based upon Congress's determination, following extensive hearings, that mass transportation had become a national, rather than a purely local, problem that had "outstripped the present resources of the cities and States," H.R. Rep. 204, *supra*, at 4; see also 1963 UMT Act Hearings 17 (statement of Robert C. Weaver), and that federal aid was "essential" (49 U.S.C. 1601(a)(3)) if the problem was to be solved. This congressional determination, to which deference is due, distinguishes the public transit industry from the core local government functions whose status was addressed in *National League of Cities*.²⁹

SAMTA suggests (Mot. to Aff. 24-26) that transit systems are indistinguishable from public hospitals, which the Court in *National League of Cities* held to be exempt from the application of the FLSA, see 426 U.S. at 855, because the hospital industry remains predominantly in the private sector, and because hospital construction has received substantial federal assistance. The largest sector of the hospital industry undoubtedly is in private hands. But the pertinent point is that pub-

²⁹ There are, of course, other examples of municipal activities heavily funded by the federal government, for instance construction of sewage treatment plants (see APTA Mot. to Aff. 24 n.35). But federal funding did not support transformation of sewage treatment from a private sector responsibility to a local public responsibility, as it did transit. Moreover, because sewage treatment has never been a private sector responsibility, there is no problem of unfair competition between government and private enterprise such as impelled Congress to extend FLSA coverage to public transit employees (see page 20, *supra*). Additionally, Congress has never determined that special attributes of sewage treatment service warrant extension of FLSA coverage to public employees in that field, separate and apart from public employees generally, as it has done in the case of public transit. There is no need in this case to consider whether application of the FLSA to other state enterprises receiving federal financial assistance would offend the doctrine of intergovernmental immunity.

lic hospitals constitute a vigorous independent national tradition of long standing in the United States.³⁰ This Court has determined that public "schools and hospitals provide[] an integral portion of those government services which the states and their political subdivisions have *traditionally* afforded their citizens." *National League of Cities*, 426 U.S. at 855 (emphasis added); see also *Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Laboratories*, slip op. 3-4 & nn. 6 & 7. There is no evidence that the public hospital sector was created by state and local government acquisitions of formerly private enterprises, much less that such transfers were underwritten with federal funds. On the contrary, as SAMTA acknowledges (Mot. to Aff. 25), the trend, if anything, is in the opposite direction. Moreover, to the extent that hospital services were provided by non-government entities in the past (and present), the major providers were churches and other nonprofit organizations, rather than private profit making enterprises. See note 30, *supra*. Thus, there is simply no factual basis for the analogy SAMTA would draw between public transit operations and public hospitals.

³⁰ For instance, in 1923, there were 601 state hospitals with 302,208 beds, and 915 locally owned hospitals with 115,871 beds (along with 220 federal hospitals with 53,869 beds) in operation, compared with 1,762 (much smaller) proprietary hospitals with only 45,719 beds. Far more significant than the proprietary sector in terms of services provided was the nonprofit sector, with 77,941 beds in 893 church operated hospitals, and 160,114 beds in 2,439 other nonprofit hospitals. *Historical Statistics, supra*, at 79 (series B 345-358). In 1980, there were a total of 5,904 short-term care non-federal hospitals in operation. 1,835 were operated by state and local government; only 730 were operated on a for-profit basis. The balance, 3,339 hospitals, were operated by nongovernmental nonprofit organizations. The foregoing state and local hospitals had 212,000 beds and 602,000 employees, while the proprietary sector had only 87,000 beds and 189,000 employees. The nonprofit hospitals had the lion's share, 693,000 beds and over 2 million employees. *Statistical Abstract of the U.S. 1982-83, supra*, at 112 (table 173).

3. The district court also suggested (J.S. App. 16a) that the potential for reevaluation of federal priorities leading to reduction of federal assistance to public transit makes it inappropriate to consider the role of federal financial assistance. But this suggestion again mistakes the significance of federal funding for purposes of the pertinent constitutional analysis. As we have explained (page 34), we do not seek to defend the application of the FLSA on the basis of the Spending Power. Even if federal aid were reduced or eliminated, the critical role played by federal assistance, particularly capital grants, in making it possible for large numbers of municipalities to enter the transit field could not be gainsaid. Furthermore, the district court's observation that federal aid could be terminated is one-sided. State and local spending decisions are, like federal funding, "responsive to changing political demands" (J.S. App. 16a). Similar considerations of political responsibility and intergovernmental comity influence the policies of both partners.

In any event, there is no reason to believe that federal assistance to mass transit is about to be terminated. Over \$3.5 billion in federal funds was actually expended in this area in 1982, and budgetary authority of \$4 billion was proposed for fiscal year 1984. See *Budget of the U.S. Government Fiscal Year 1984*, *supra*, at 5-66, 5-68 to 5-69. Moreover, the enactment of the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097, provides a new secure funding source for mass transit by dedicating one cent per gallon of the recent gasoline tax increase to mass transit capital projects and creating a grant program, funded from general revenues, for capital and operating assistance.³¹

³¹ See Pub. L. No. 97-424, §§ 301-304, 511, 531, 96 Stat. 2140-2150, 2169, 2187-2192; H.R. Conf. Rep. 97-987, 97th Cong., 2d Sess. 149-157, 161-163, 191-193 (1982); H.R. Rep. 97-555, 97th Cong., 2d Sess. 2, 4, 35-42 (1982); *Budget of the U.S. Government Fiscal Year 1984*, *supra*, at 5-68 to 5-69; *id.* at App. I-Q23 to I-Q27.

2. *Extension Of Intergovernmental Immunity To Public Transit Systems Would Erode Federal Authority To Regulate Commerce*

a. The comparatively recent development of substantial public ownership in the mass transit industry serves to distinguish public transit from the governmental activities held exempt from application of the FLSA in *National League of Cities* in an additional respect. The states and their subdivisions entered the fields of police and fire protection, public health and sanitation services, hospitals and education long before the enactment of federal legislation governing terms of employment. And for more than 30 years after the FLSA was adopted Congress recognized the prerogatives of the states in these spheres. The vice of the 1974 amendments to the FLSA thus was the abrupt federal intrusion affecting the entire range of settled patterns of local and state government administration. See 426 U.S. at 845-852; *EEOC v. Wyoming*, slip op. 12-13.

In contrast, employment relationships in the private transit industry had long been the subject of federal regulatory legislation under the Commerce Clause when, in the 1960's, local governments began in large numbers to acquire transit systems. The nation's basic labor-management relations statute, the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, enacted in 1935, applies to the private transit industry just as it does to other industries affecting commerce. See *Bus Employees, Div. 998 v. Wisconsin Employment Relations Board*, *supra*; *Div. 1287, Bus Employees v. Missouri*, *supra*. Furthermore, as Congress expanded the scope of national labor legislation, it applied a broad range of federal laws to the private transit industry, including the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. (& Supp. V) 401 *et seq.* (reporting requirements); the Fair Labor Standards Amendments of 1961 (minimum wage and child labor standards; see page 3, note 5, *supra*); the Equal Pay Act of 1963, 29 U.S.C. 206(d)

(equal pay for women for equal work); Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* (prohibition against employment discrimination on the basis of race, sex, creed, or national origin); and the Fair Labor Standards Amendments of 1966 (minimum wage; overtime pay for non-operating employees; see page 3 & note 5, *supra*). These statutes reached the majority of all transit systems, 90% of which were still privately owned in 1967. *Transit Fact Book, supra*, at 38. Thus, when they assumed ownership of private transit companies, states and local governments entered an industry in which employment relations were subject to established federal legislation.

Because of this significant federal regulatory presence, a municipality deciding to operate a mass transit system "subjects itself to that regulation." *Parden v. Terminal Ry.*, 377 U.S. 184, 196 (1964); *New York v. United States*, 326 U.S. 572, 582 (1946) (opinion of Frankfurter, J.); *Helvering v. Powers*, 293 U.S. at 225 (see pages 18-19, *supra*); see also *Massachusetts v. United States*, 435 U.S. 444, 457-458 (1978) (opinion of Brennan, J.). This principle was recently reaffirmed in *Long Island R.R.* Citing the history of federal regulation of the private rail industry, the Court declared (455 U.S. at 687):

[T]here is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.

In *Kramer v. New Castle Area Transit Authority*, 677 F.2d at 310, the court of appeals accordingly concluded:

[S]ince it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in this area.

Accord: *Dove v. Chattanooga Area Regional Transportation Authority*, 701 F.2d at 53.

The district court determined, however, that exemption of public transit employment from the requirements of the FLSA would not entail the kind of erosion of federal authority condemned in *Long Island R.R.* (J.S. App. 6a-11a). The court noted that the FLSA was not applied to private transit until 1961 or to public transit until 1966 and did not extend full protection to transit employees until 1974. But while Congress did not fully exercise its powers to legislate respecting terms of employment in the transit industry until relatively recently, there can be no doubt that the constitutional authority to do so has long been available. If the states' acquisition of private transit operations were held to extend their intergovernmental immunity thereto, it necessarily would vitiate federal constitutional prerogatives. Moreover, the fact is that the FLSA was made applicable to the private transit industry in 1961, and, indeed, to public transit in 1966—before the bulk of the recent conversions to public ownership took place (see pages 16-18, *supra*).³²

The Court in *Long Island R.R.* did observe that railroads had long been subject to federal regulatory legislation. 455 U.S. at 687-688. There was no suggestion, however, that such longstanding regulation was necessary to the holding that the State of New York could not extend its immunity to a commuter railroad merely by acquiring the railroad. Although the specific federal legislation at issue here is of comparatively recent vin-

³² The fact that the overtime provisions of the FLSA were not fully applied to the transit industry until 1974 does not alter the analysis. Congress had plainly entered the field of wage regulation in the transit industry with the 1961 and 1966 FLSA amendments. The overtime pay requirement is not regulation fundamentally different from that previously in place. No constitutional immunity may be founded upon Congress's decision to regulate one aspect of wages in a given industry but not another. Cf. *EEOC v. Wyoming*, slip op. 15 n.17.

tage, it scarcely follows that the freedom from such regulation of state activities of contemporaneous or still more recent vintage is essential to the separate and independent existence of the states. Cf. *Donovan v. Dewey*, 452 U.S. 594, 605-606 (1981). Because of the Supremacy Clause, the interests of the states and those of the federal government do not stand on a par in this area. Rather, within the broad limits of Congress's power to regulate commerce, federal legislation applies to the states to the extent deemed appropriate by Congress unless it is determined that such application "so impairs the ability of the state to carry out its constitutionally preserved sovereign function as to come into conflict with the Tenth Amendment." *Long Island R.R.*, 455 U.S. at 683. Unless state functions are already well-established at the time they become subject to nondiscriminatory federal commerce power legislation, it is difficult to discern significant "displace[ment of] the States' freedom to structure integral operations" (*National League of Cities*, 426 U.S. at 852).

In any event, if it were necessary to show that federal regulation of employment in the transit industry was established before the recent trend toward public operation of transit, the half-century of application of the National Labor Relations Act to the transit industry supplies the necessary predicate. Indeed, in *Long Island R.R.* the Court's recitation of the long history of federal railroad legislation was concerned primarily with regulatory schemes other than the Railway Labor Act, the statute directly in issue there. See 455 U.S. at 687-688 & n.13. Thus, like the railroad industry, local transit has long been the subject of substantial federal regulation governing employment relations.³³ To hold that the FLSA, which

³³ The district court suggested (J.S. App. 9a, 10a) that statutes such as the NLRA are irrelevant here because Congress itself exempted local government employers from their reach. But the issue is not, as the district court thought (*id.* at 9a), whether "any diminution of federal authority under the NLRA that results from a private to public conversion is * * * consistent with congressional

expressly covers public transit employment, impermissibly interferes with state sovereignty is to sanction "ero[sion] of federal authority in [an] area[] traditionally subject to federal statutory regulation" (*Long Island R.R.*, 455 U.S. at 687).

C. Application Of The FLSA To Public Transit Systems Does Not Effect An Unwarranted Intrusion Upon State Sovereignty

1. Even if it were established that mass transit has assumed the status of a core local government function, appellees must demonstrate that application of the FLSA to public transit systems is a "federal intrusion[] that might threaten [the states'] 'separate and independent existence'" (*EEOC v. Wyoming*, slip op. 11 (quoting *National League of Cities*, 426 U.S. at 851)) by "directly displac[ing their] freedom to structure integral operations in [these] areas" (*National League of Cities*, 426 U.S. at 852). In view of the course of development of the public sector of the transit industry, and conditions prevailing in the private sector prior to the acceleration of public takeovers in the 1960's, appellees cannot make such a showing.³⁴

intent." Rather, the NLRA is instructive because it evidences that the transit industry has "traditionally [been] subject to federal statutory regulation" (*Long Island R.R.*, 455 U.S. at 687). In examining the succession of federal statutes that historically governed commerce by rail, the Court did not pause in *Long Island R.R.* to inquire whether particular statutes were applicable to publicly operated railroads. The relevance of these statutes was not that they established longstanding regulation of publicly owned railroads; it was sufficient that they established regulation of the heavily private railroad industry. Against this background of federal regulation of the railroad industry, the Court concluded that the Railway Labor Act, which expressly covers state owned commuter railroads (see 455 U.S. at 682 n.4), does not intrude impermissibly upon matters of state sovereignty. A similar analysis is applicable here.

³⁴ Contrary to appellees' contentions (SAMTA Mot. to Aff. 8-9 & n.8; APTA Mot. to Aff. 6-9), *National Leagues of Cities* does not

First, unlike the FLSA amendments of 1974 condemned in *National League of Cities*, the public transit provisions are carefully targeted at a discrete function, which in most cases was assumed by state and local governments after the initial application of the FLSA to transit operations and even after the application of the FLSA to public transit operations. Compare page 39, *supra*. Thus, in many instances local governments acquired transit systems knowing that they were subject to the Act. Compare *Long Island R.R.*, 455 U.S. at 689-690. And in entering the transit field, local governments could not reasonably have relied upon exemption from the FLSA of publicly owned common carriers operating in commerce. Furthermore, because the public transit provisions of the FLSA are limited in their coverage, their application does not create cause for the concern, underlying *National League of Cities*, "with the effect of the federal regulatory scheme [not only] on the particular decisions it was purporting to regulate, but also with the potential impact of that scheme on the States' ability to structure operations and set priorities over a wide range of decisions" (*EEOC v. Wyoming*, slip op. 12). Requiring public operators of transit systems to comply with minimum standards of decency in regard to wages, hours, and child labor is unlikely to set off "a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking," such as the Court foresaw in *National League of Cities* (*EEOC v. Wyoming*, slip op. 13). Rather here, as in *EEOC v. Wyoming* (*ibid.*), "[n]othing * * * portends anything

resolve this "intrusiveness" issue for the public transit industry. The Court made this clear in *EEOC v. Wyoming*, slip op. 11 n.11):

[W]e are not to be understood to suggest that every state employment decision aimed simply at advancing a generalized interest in efficient management—even the efficient management of traditional state functions—should be considered to be an exercise of an "undoubted attribute of state sovereignty."

like the same wide-ranging and profound threat to the structure of State governance.”³⁵

The impact of the public transit provisions of the FLSA is further diminished by Section 13(c) of the UMT Act, 49 U.S.C. 1609(c), which provides that “it shall be a condition of any assistance” under the UMT that “fair and equitable arrangements [be] made, as determined by the Secretary of Labor, to protect the interests” of affected employees. Such protective arrangements are required to preserve existing rights for employees of transit systems acquired by public entities. See *Jackson Transit*, 457 U.S. at 17-18. Because of Section 13(c), public transit operators that have accepted federal assistance do not enjoy untrammelled “freedom to structure integral operations” respecting the terms of transit employment. Instead, they are bound to maintain existing wage levels, which, for much of the private transit sector, had been subject to minimum wage standards since 1961. See page 3 note 5, *supra*.

Nor did phasing out of the special overtime exemption for transit operating employees in 1974 intrude upon state prerogatives in an impermissible fashion. To begin with, public transit systems have been required to pay overtime to nonoperating employees since 1966. Second, the overtime exemption was phased out, rather than abruptly abolished. Moreover, collective bargaining agreements in the transit industry at the time of the 1974 amendments almost uniformly required payment of overtime pay after 40 hours in a work week. Aff. of Alexander Cohn (May 19, 1980) ¶ 5; H.R. Rep. 93-913, 93d Cong., 2d Sess. 30-31 (1974). Application of the FLSA overtime standards to public transit systems accordingly does not compel the states generally “to abandon the[ir] public policy decisions” or to cease “do[ing] *precisely what they are doing*” (*EEOC v. Wyoming*, slip op. 12 (emphasis in original)).

³⁵ The fact that transit service operates on a fee for service basis even in the public sector reduces to some degree the impact of “spillover” effects of transit costs on other public priorities. See page 48 note 37, *infra*.

Congress was aware of the claims of transit operators that paying overtime created special hardships for them in light of special attributes of transit service. H.R. Rep. 93-313, *supra*, at 30. But Congress determined that these problems could be accommodated within the framework of the Act by administrative and judicial construction, and by legislative fine-tuning if necessary (*id.* at 31). In addition, Congress determined, based on review of collective bargaining agreements in the industry, that "the 'problems' of the 40-hour workweek pointed to by some segments of the industry have and already are being met and resolved by a substantial majority of the industry." *Ibid.* Congress's determination that payment of overtime to operating employees would not significantly burden transit operations is entitled to deference.

2. Even when a federal commerce power enactment appears to interfere with protected state functions, a Tenth Amendment challenge may fail because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 288 n.29; see also *Long Island R.R.*, 455 U.S. at 684 n.9; *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring). This is such a situation. Denial of congressional authority to establish wage standards for mass transit systems would significantly "impair a prime purpose of the Federal Government's establishment" (*National League of Cities*, 426 U.S. at 855 n.18, quoting *Case v. Bowles*, 327 U.S. 92, 102 (1946)), because transit service is intimately related to the flow of interstate commerce, and because Congress has determined that coverage of public transit employees is necessary to avoid unfair competition.

In enacting the UMT Act, Congress recognized the national character of transit problems, emphasizing the interstate impact of transit operations in many locations:

[T]he problem of providing adequate urban mass transportation service has long ago spilled over the

boundaries of many local political jurisdictions. In fact, it has spilled over a good many State boundaries. Some 53 of our approximately 200 metropolitan areas either border on or cross State lines.

H.R. Rep. 204, *supra*, at 5. In the UMT Act itself Congress has determined (49 U.S.C. 1601(a)(1)) that

the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States.

The courts also have long recognized the special significance of transit operations—even local ones—for the flow of interstate commerce. See, e.g., *United States v. Capital Transit Co.*, 338 U.S. 286, 290 (1949); *Marshall v. Victoria Transportation Co.*, 603 F.2d 1122 (5th Cir. 1979); *NLRB v. Baltimore Transit Co.*, 140 F.2d 51, 53-54 (4th Cir. 1944); see also *Local Transit Lines*, 91 NLRB 623, 624 (1950); cf. *Bus Employees, Div. 998 v. Wisconsin Employment Relations Board*, 340 U.S. at 392 n.14. Because of the direct impact of transit service on interstate commerce the FLSA may constitutionally be applied to public transit employees.

This is especially so because in extending the Act's coverage, Congress expressly determined (H.R. Rep. 1366, *supra*, at 16-17; S. Rep. 1487, *supra*, at 8; see page 20, *supra*) that failure to include public transit systems would unfairly advantage such systems at the expense of private companies with which they were in competition, frustrating one of the basic purposes of the Act. Congress's "determin[ation] that a uniform regulatory scheme" covering public and private transit carriers is necessary to prevent unfair competition certainly was within its authority. *Long Island R.R.*, 455 U.S. at 688. If the Court were to extend intergovernmental immunity to public transit, it would thus effectively deprive the United States of its ability evenhandedly to regulate a significant aspect of interstate commerce. The immunity

doctrine recognized in *National League of Cities* plainly is not intended to afford government operated enterprises preferential status in regard to nondiscriminatory Commerce Clause regulation. See page 23, note 23, *supra*.

Nor has Congress's concern with unfair competition between private and public enterprise become outmoded by the growth of the public sector of the transit industry. The private sector of the industry remains substantial. See pages 17-18, *supra*. Moreover, the pattern of public acquisitions of private systems makes it particularly important not to provide government transit operators an unfair advantage over the remaining private sector operators. Even where public transit is a firmly established norm, the possibility remains for innovative entrepreneurs to devise new services that will successfully compete for patronage.³⁶ Extension of the intergovernmental immunity doctrine to public transit services necessarily handicaps those who would provide competing services, to the detriment of the public and the free flow of commerce.³⁷

³⁶ For instance, in the New York City area a number of privately owned express bus operations emerged in the late 1960's and 1970's. N.Y. Times, June 11, 1970, at 90, col. 1. As of 1981 there were 11 privately owned bus transit lines operating within New York City alone. DOT *Urban Transit Directory 2* (see page 18, note 17, *supra*).

³⁷ In considering the federal interest in preventing such unfair competition, it is important to remember that, unlike the core governmental services held exempt from the FLSA in *National League of Cities*, which are generally provided to members of the public without user charges, public transit operates on a fee-for-service basis, in competition with other modes of transportation. See *Jefferson County Pharmaceutical Ass'n*, slip op. 4 n.7.

We recognize that, unlike police and fire protection, education, sanitation, public health, and parks, public hospitals undoubtedly receive fees from many of their patients. But even so, public hospitals as well as private nonprofit hospitals have a substantial tradition of providing service free of charge to persons unable to pay. See J. Duffy *A History of Public Health in New York 1866-1966* 178-185 (1974) (80% of patients in hospitals on Manhattan Island

3. Appellees' argument that public transit service is a core governmental function necessarily rests heavily upon the recent expansion of the public sector of the local transit industry (see APTA Mot. to Aff. 11-13; SAMTA Mot. to Aff. 19-23 & n.21). But the district court and appellees ignore the fact that the FLSA was applied to the public sector of the transit industry in 1966, at a time when transit service was, by any measure, still predominantly a service provided by private enterprise. See page 17, *supra*. Thus, any contemporaneous challenge to the constitutionality of the public transit provisions of the 1966 FLSA amendments surely would have been rejected as frivolous. See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 422 (opinion of Burger, C.J.); cf. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-353 (1974); *Helvering v. Powers*, *supra*. Indeed, appellees do not suggest otherwise.³⁸

were charity cases). Cf. Hill-Burton Act, 42 U.S.C. 291c(e). Transit service is unlike these core functions in that, with rare exceptions, all patrons are required to pay fares that defray a substantial share of operating costs. It is true that, in recent years, transit systems have been unable to meet operating expenses without subsidies from tax revenues. Even so, passenger revenues cannot be regarded as insignificant. In 1980 fares collected amounted to \$2.46 billion, and constituted 40.7% of transit industry operating revenues. *Transit Fact Book 1981, supra*, at 45, 46 (table 5). Thus, unlike the services held exempt from the FLSA in *National League of Cities*, public transit service is virtually never made "available at little or no direct expense" (*Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979)).

³⁸ We note that in testifying before Congress against bills to extend FLSA coverage to state and municipal employees in 1971, a representative of the National League of Cities conceded that "transit would be an activity of local government with comparable activity in private enterprise, and therefore * * * could probably be regulated [even though a] municipality was performing the activity." *Fair Labor Standards Amendments of 1971: Hearings on S. 1861 and S. 2259 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess., Pt. 5, 1701 (1971) (statement of Richard E. Thompson).

Of course, no such contemporaneous challenge was made; nor was the public transit coverage of the FLSA attacked in *National League of Cities* itself. Nevertheless, appellees' contention is that intervening developments in the transit industry have now rendered these very provisions beyond Congress's authority under the Commerce Clause. Even if federal aid had not played a substantial role in the growth of the public sector of the transit industry, and even if concern for competition between private and public transportation alternatives were not still a sufficient justification for federal legislation, it would indeed be a peculiar and unworkable rule of constitutional law that would countenance this result. On what date did the public transit provisions of the FLSA, assuredly valid when enacted, become unconstitutional? If this doctrine of creeping unconstitutionality were accepted, Congress and the courts would effectively be enjoined to survey subsisting legislation "adjusting burdens and benefits of economic life" (*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 15) at regular intervals in order to ensure that changed economic or social conditions had not altered the basis for exercise of federal commerce power authority.

In our constitutional scheme, it is uniquely Congress's role periodically to revisit legislative determinations such as those underlying the public transit provisions of the FLSA, and to adjust them, as the public interest may require, in light of changing conditions, including the expanded role of government (state, local or federal) in the provision of particular services. But precisely because that is so, because Congress is far better equipped than the courts to weigh the pertinent social and economic considerations, and because the interests of the states and municipalities and their citizens are well represented in Congress, extension of a rigid rule of constitutional law to provide an exemption from the FLSA that public transit operators deem desirable is inappropriate. Rather, Congress is the forum to which such petitions should be addressed.

Significantly, on the very day that *Long Island R.R.* was decided, a unanimous Court applied the principles outlined above to limit the constitutional intergovernmental tax immunity of agents of the federal government:

If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for that decision * * *. And this allocation of responsibility is wholly appropriate, for the political process is "uniquely adapted to accommodating the competing demands" in this area. *Massachusetts v. United States*, 435 U.S. 444, 456 (1978) (plurality opinion). * * * But absent congressional action, we have emphasized that the States' power to tax can be denied only under "the clearest constitutional mandate."

United States v. New Mexico, 455 U.S. 720, 737-738 (1982) (citations omitted). Similarly, in rejecting another claim of intergovernmental tax immunity advanced by the United States, the Court observed:

Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones Congress is best qualified to resolve.

United States v. City of Detroit, 355 U.S. 466, 474 (1958). These considerations are equally relevant in assessing wide-ranging state claims to intergovernmental immunity from federal commerce power legislation.

CONCLUSION

The judgment of the district court should be reversed.
Respectfully submitted.

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DECEMBER 1983

APPENDIX

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

The Congress shall have Power

* * *

To regulate Commerce * * * among the several States * * *;

* * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI, cl. 2:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.*, provides in pertinent part:

29 U.S.C. (& Supp. V) 203:

As used in this chapter—

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a

public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For purposes of this subsection, the activities performed by any person or persons—

* * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

(1) * * * is an enterprise * * * whose gross annual volume of sales made or business done is not less than \$250,000 * * *

* * *

(5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(6) is an activity of a public agency.

* * * * *

The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

* * * * *

29 U.S.C. (Supp. V) 206(a):

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than \$2.65 an hour during the year beginning January 1, 1978, not less than \$2.90 an hour during the year beginning January 1, 1979, not less than \$3.10 an hour during the year beginning January 1, 1980, and not less than \$3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a) :

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

3. The Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, provides in pertinent part:

49 U.S.C. 1601:

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) that Federal financial assistance for the development of efficient and coordinated

mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are—

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

49 U.S.C. (Supp. V) 1603(a):

* * * The Federal grant for any such project to be assisted under section 1602 of this title shall be in an amount equal to 80 per centum of the net project cost. * * *

49 U.S.C. 1604(d) (1)

The Secretary may approve as a project under this section, on such terms and conditions as he may prescribe, (A) the acquisition, construction, and improvement of facilities and equipment for use, by operation or lease or otherwise, in mass transportation service, and (B) the payment of operating expenses to improve or to continue such service by operation, lease, contract, or otherwise.

49 U.S.C. 1604(e):

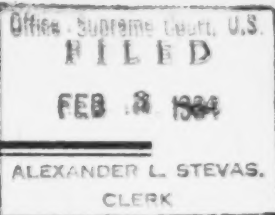
The Federal grant for any construction project under this section shall not exceed 80 per

centum of the cost of the construction project, as determined under section 1603(a) of this title. The Federal grant for any project for the payment of subsidies for operating expenses shall not exceed 50 per centum of the cost of such operating expense project. * * *

49 U.S.C. 1609(c) :

It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Nos. 82-1951 and 82-1913



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States
District Court For The
Western District Of Texas

**BRIEF OF SAN ANTONIO
METROPOLITAN TRANSIT AUTHORITY**

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QUESTIONS PRESENTED

1. Whether *National League of Cities v. Usery*, 426 U.S. 833 (1976), bars application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (1976 & Supp. V 1981) ("FLSA") to the operations of San Antonio Metropolitan Transit Authority because it is performing an integral operation in an area of traditional governmental functions?

2. Whether the FLSA's minimum wage and overtime provisions, having been held inapplicable to most state and local government employees in *National League*, are inapplicable to all such employees in the absence of congressional enactment of a constitutionally valid amendment to that Act?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 82-1951 and 82-1913

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States
District Court For The
Western District Of Texas

**BRIEF OF SAN ANTONIO
METROPOLITAN TRANSIT AUTHORITY**

**CONSTITUTIONAL PROVISIONS AND STATUTES
INVOLVED**

In addition to the laws reproduced in the Government's brief, certain provisions from Texas Revised Civil Statutes Annotated, articles 1118x (Vernon Supp. 1982-83), 6663b and

6663c (Vernon 1977) are involved in this case. The more important provisions are set forth in an appendix to this brief, *infra*, 1a-8a, along with additional excerpts from the FLSA and the Urban Mass Transportation Act, 49 U.S.C. § 1601, *et seq.* (1976 & Supp. V 1981) ("UMTA").

STATEMENT OF THE CASE

An Historical Overview Of The FLSA, As Applied To The States

As originally enacted in 1938, the FLSA set minimum wage and overtime pay requirements for employees engaged in commerce or the production of goods for commerce. Specifically excluded were states and their political subdivisions as well as employees of "street, suburban, or interurban electric railway[s], or local trolley or motorbus carrier[s]." Pub. L. No. 75-718, §§ 3(d), 13(a)(9), 52 Stat. 1060, 1067 (1938).

In 1961, the FLSA was amended to extend minimum wage coverage to employees of private electric railways and trolley and motorbus carriers having gross revenues of one million dollars or more; an exemption from the overtime requirements for all such employees was simultaneously enacted. Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72 (1961). The exemption from both the minimum wage and overtime provisions was continued for all employees of such entities having gross revenues of less than one million dollars. *Id.* § 9. The total exemption of public employers remained unchanged.

In 1966, the FLSA was amended to cover states or their political subdivisions with respect to schools, hospitals and "street, suburban or interurban electric railway[s], or local trolley or motorbus carrier[s] . . . [whose] rates and services . . . are subject to regulation by a State or local agency" Pub. L. No. 89-601, §§ 102(a) & 102(b), 80 Stat. 830, 831 (1966). The threshold level for coverage was reduced to \$250,000, and the overtime exemption was continued for transit operators, drivers and conductors. *Id.* §§ 102(c), 206(c). In 1968, the amendment covering public schools and hospitals was held constitutional. *Maryland v. Wirtz*, 392 U.S. 183 (1968).

In 1974, the FLSA was amended to reach all state and local government employees and, in stages, to repeal the overtime exemption for drivers, operators and conductors effective May 1, 1976. Pub. L. No. 93-259, §§ 6(a)(1), 6(a)(6) & 21(b)(1), 88 Stat. 55, 58, 60, 68 (1974). The constitutionality of the amendments covering state and local government employees was challenged in a landmark case in which this Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art I, § 8, cl 3." *National League*, 426 U.S. at 852. The Court did not identify all constitutionally protected state activities, but listed by way of example "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. The Court expressly overruled *Maryland v. Wirtz*, and thereby extended constitutional immunity to schools and hospitals, which it concluded also "provide[] an integral portion of those governmental services¹ which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S. at 855. The only activity identified as not being immune was a state-operated railroad. *Id.* at 854 n.18. Public transit was not mentioned.

On remand, the court recognized that this Court's decision did not provide an exhaustive list of exempt activities and left a gray area for future resolution. *National League of Cities v. Marshall*, 429 F. Supp. 703, 705-06 (D.D.C. 1977). As a result, the Secretary of Labor issued regulations (29 C.F.R. §§ 775.2 & 775.3) under which the Wage and Hour Administrator is to determine those operations against which he will seek to enforce the FLSA and to publish those determinations as amendments to section 775.3(b).

¹ Garcia's brief (pp. 7, 8, 13, 23, 24) is largely premised on the faulty and self-serving hypothesis that government provision of a "service" should be treated differently from the activities exempted in *National League*. Garcia's strained logic disregards the fact that the very activities listed in *National League* were denominated services by this Court.

The Proceedings In This Case

By letter dated September 17, 1979 (R. 163), to the Amalgamated Transit Union, the Deputy Wage and Hour Administrator concluded that "publicly operated local mass transit systems such as the San Antonio Transit System [SAMTA's municipally-owned predecessor] . . . are not within the constitutional immunity of the Tenth Amendment as defined by the Supreme Court in *National League*. . . ." On November 21, 1979, SAMTA filed this action for a declaratory judgment that the FLSA's minimum wage and overtime provisions are inapplicable to its operations. SAMTA's operators then brought a separate action for alleged unpaid overtime and liquidated damages, which was stayed pending disposition of the constitutional issue in this suit. The Secretary of Labor counterclaimed against SAMTA for backpay and injunctive relief, and the American Public Transit Association ("APTA") and Joe G. Garcia, one of SAMTA's employees, were permitted to intervene.

On November 17, 1981, the district court held that local publicly owned mass transit systems constitute integral operations in areas of traditional governmental functions under *National League* and entered summary judgment in favor of SAMTA and APTA. Gov't J.S. App. C. Upon direct appeal, this Court vacated the district court's decision and remanded for "further consideration" in light of its intervening decision in *United Transportation Union v. Long Island Rail Road*, 455 U.S. 678 (1982) ("LIRR"). *Donovan v. San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

On February 18, 1983, the district court reentered summary judgment in favor of SAMTA and APTA.² The court articulated the question before it as "whether public transit is one of 'the numerous line and support activities which are well within the area of traditional operations of state and local govern-

² A copy of the district court's opinion has been reproduced as Appendix A to the Government's jurisdictional statement and is cited in this brief as "Gov't J.S."

ments.' " Gov't J.S. 3a (emphasis in original). The court found that "mass transit has traditionally been a state prerogative and responsibility, not a federal concern," and that "[u]nlike the railroad in *LIRR*, . . . neither labor relations nor other aspects of mass transit have been the subject of federal regulation that will be eroded by recognizing a Tenth Amendment immunity." Gov't J.S. 6a, 7a. The court also concluded that "[t]he states themselves have given public transportation almost universal recognition as an essential state function, thus placing it on a par with the [*National League of Cities v. Usery* functions," and that "Congress [has] recognized the similarities between public transit and the *Usery* functions." Gov't J.S. 12a, 13a. The court rejected the claim that partial federal funding of transit defeats *National League* immunity because the federal funding statute for transit "is an exercise of the Congressional Spending Power," "federal funding supports each of the *Usery* functions," and "the recent dramatic shifts in federal priorities show that federal funding is a particularly inappropriate test for a state's Tenth Amendment immunity." Gov't J.S. 14a, 16a.

The district court also rejected the "[p]ervasiveness of government performance of a function" and a "function's origins in the private sector" as bases for distinguishing transit from the activities listed in *National League* and cited statistics showing that publicly owned hospitals would not be exempt under such a test. Gov't J.S. 16a, 17a. Finally, the court concluded that transit satisfied the four immunizing factors set out in *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979): transit "benefits the community as a whole"; it "is provided at a heavily subsidized price"; transit "services cannot be provided at a profit"; and "government is today the primary provider of transit services." Gov't J.S. 18a, 19a.³

³ Since *LIRR* was decided, four federal appellate courts have considered this same question. However, contrary to the Government's claim (brief p. 10), all courts of appeals have not "unanimously recognized" the constitutionality of FLSA coverage of publicly owned transit systems. In *Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841 (1st Cir. 1982),

Facts About Public Transit In San Antonio⁴

Publicly owned transit has existed in San Antonio since 1959, when the City acquired the San Antonio Transit Company and began providing transit as a municipal service through the newly created San Antonio Transit System ("SATS").⁵ The City's purchase was financed by revenue

the court held that a highway authority which, among other things, had the power to operate a mass transportation system (and intended to build one) was exempt under *National League* because its activities were "sufficient to indicate that the Authority is responsible for 'traditional' or 'integral' governmental activities." *Id.* at 845. The court could find "no meaningful distinction between the Authority's activities, and those, for example, of a municipal airport, . . . or the parks, recreation and public health activities mentioned in *National League of Cities* itself." 680 F.2d at 846. *National League* immunity was denied in *Alewine v. City Council of Augusta, Ga.*, 699 F.2d 1060 (11th Cir. 1983), *petitions for cert. pending* (Nos. 82-1974 & 83-257) and *Kramer v. New Castle Area Transit Auth.*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983), and summary judgment on this issue was reversed in *Dove v. Chattanooga Area Regional Transp. Auth.*, 701 F.2d 50 (6th Cir. 1983). *Alewine* and *Kramer* were based on an historical approach, which was eschewed by this Court in *LIRR*, and on federal funding under UMTA, which contravenes this Court's decision in *Jackson Transit Auth. v. Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982), see discussion *infra* pp. 29-33, 41-45. *Dove* relied in large part on this Court's denial of certiorari in *Kramer* and federal funding of transit.

⁴ Unless another citation is given, the facts are taken from the affidavit of Wayne Cook. R. 196-203.

⁵ Garcia's brief (p. 3) gives the erroneous impression that the City may have created SATS to make money. As newspaper articles at the time indicate, this was not the case. According to one article, negotiations between the City and the transit company for a new franchise broke down over increased fares and "inadequate city control over future fare increases." As a result, the City called a bond election to purchase the system. The San Antonio Light December 23, 1958 at A1, col. 1 and A4, col. 1. An article in The Light on January 11, 1959, recites that "if voters veto the bond issue the city will be forced to grant a new franchise to the present company on the company's terms . . . [which] would almost certainly include continued increases in fares"; that the transit company intends "to double the fares of school children"; and that "the city . . . held that fares should be reduced rather than increased." The article mentions a newsletter from the research and planning council and states that public transit "is a declining industry due to soaring costs, declining patronage and vanishing profits," which can result

bonds, and no federal funds were involved in the acquisition. For forty-four years before 1959, the City regulated street transportation pursuant to authority from the state. See *infra*, pp. 24-26.

In 1973, the Texas Legislature enacted article 1118x, which authorizes the establishment of metropolitan rapid transit authorities and provides that they are "exercising public and essential governmental functions. . . ." *Id.* § 6(a).⁶ SAMTA was created under article 1118x by the City Council of San Antonio in 1977. After an election was held confirming SAMTA's creation and authorizing it to levy a one-half percent sales tax, SAMTA purchased the facilities and equipment of SATS from the City and commenced operations on March 1, 1978. SAMTA funded the purchase through bonds secured by its revenues and certain property. No federal funds were used in the purchase.

During its first two fiscal years, SAMTA's regularly scheduled line-service buses carried approximately 63.4 million passengers over more than 26.5 million bus miles. Of these passengers, approximately 5.3 million were senior citizens, 1.5 million were handicapped persons and 14.6 million were elementa-

in "deficits and subsidies . . . [that] have to be provided for out of taxes." The article closes by stating that "City officials are well aware of these complications. But they simply see no alternative to municipal ownership unless public transportation is to be discontinued. Because this is an issue of broad public policy they have referred the question to the voters." *Id.* at A1, col. 1 & A4, col. 1.

⁶ Under article 1118x, an authority can, among other things, exercise the right of eminent domain; establish and maintain fares subject to approval by a local government approval committee; make all rules and regulations governing the use, operation and maintenance of the system; issue bonds and notes; levy and collect motor vehicle emission taxes; levy, collect and impose a local sales and use tax subject to a local election; levy and collect any kind of tax other than an ad valorem tax on property which is not prohibited by the Texas constitution; and prescribe the compensation of its employees. *Id.* §§ 6, 6E, 7, 8, 11A, 11B, 12(a). An authority *must* provide service to incorporated cities and unincorporated areas adjacent to its service area if the electorate of such a city or area vote for annexation into the authority. *Id.* § 6A.

ry, junior high, high school and college students, and children under 12. Approximately 3.3 million other student passengers were transported to and from school by SAMTA on nonline school bus service pursuant to arrangements with two Bexar County school districts. It is estimated that at least two-thirds of all passengers riding SAMTA's regular line-service buses are travelling to or from school or their jobs. SAMTA also serves the needs of the elderly and handicapped through a fleet of lift-equipped vans, which cost riders 50¢ and SAMTA over \$8.50 per trip.⁷

SAMTA operates almost entirely from local sales taxes, federal funds and fare box receipts. Fares charged to passengers are nominal, ranging from no charge for the smaller El Centro buses that circulate through the downtown area, up to 60¢ per ride for the longest runs, with children, the elderly and the handicapped paying 10¢. The average fare is 18¢. For SAMTA's first two fiscal years, total revenues from line-service fares were about \$10.1 million, compared to operating expenses for such services of about \$41.6 million. SAMTA had an operational deficit of about \$31.5 million, which was satisfied from sales taxes totalling approximately \$26.8 million, operational grants of approximately \$12.5 million from the Urban Mass Transportation Administration, and other operational revenues of approximately \$.7 million.

Summary Of Argument

I. In *National League* this Court held that the States' power to determine wages and hours is an attribute of state sovereignty and that the FLSA unconstitutionally threatens the States' separate and independent existence when it is applied to "integral operations in areas of traditional governmental functions." 426 U.S. at 852. The narrow question presented in this case, therefore, is whether publicly owned mass transit is an activity that is properly includable in the "catalogue of the numerous line and support activities" which

⁷ Facts regarding fares are from the record and therefore reflect circumstances at the time of briefing in the court below.

the Court has insulated from FLSA coverage. *Id.* at 851 n.16. Transit clearly is one of these activities.

A. In *LIRR*, the Court relied upon certain characteristics of railroads which made the Long Island Railroad a nontraditional state activity. Transit does not share these characteristics.

1. Unlike railroads, for which the "Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system," *LIRR*, 455 U.S. at 688, transit provides a purely local service and is not part of a national transportation system requiring uniformity.

2. Unlike railroads, which "have been subject to comprehensive federal regulation for nearly a century," *id.* at 687, Congress has regulated transit no more than the activities specifically protected in *National League*. In contrast to the industry-specific laws aimed at railroads, the National Labor Relations Act, cited by the Government, is a law of general application that applies to all exempt *National League* activities when performed by nonpublic employers. It encompasses most all private sector activities and does *not* apply to the States. If this generally applicable law could defeat Tenth Amendment immunity, then those activities in *National League* having substantial private sector involvement (notably hospitals, sanitation, and parks and recreation) would be denied immunity as would any new function undertaken by the States if it had ever been performed by the private sector. The discrimination laws, also cited by the Government, are irrelevant because they apply to all state and local government activities, including those which this Court protected in *National League*. The FLSA amendments of 1961 and 1966 likewise cannot satisfy the requirement that transit be subject to federal regulation that is long standing and comprehensive. For its first twenty-three years, the FLSA exempted all transit employees. The 1961 amendments brought limited minimum wage coverage to certain large systems, while granting a total exemption from the overtime requirements. Even the 1966 amendments did not cover all transit systems and con-

tinued the overtime exemption for operating employees, who were the vast majority of the work force. Not until 1974 were all publicly owned transit systems swept under the FLSA along with virtually all other state and local government employees; however, those amendments, which are the very subject of this litigation, cannot evidence long-standing comprehensive regulation of transit.

3. Unlike the railroad industry, which had no "history of long standing state regulation," *LIRR*, 455 U.S. at 688, state and local government regulation of street transportation in Texas dates back more than seven decades. Since at least 1913, the cities have had exclusive control over their streets and highways. In 1915, the City of San Antonio started regulating vehicles operated to transport passengers for hire. This continued until 1959, when the City acquired the local transit system pursuant to a state law, which was followed in 1978 by the creation of SAMTA.

4. Unlike passenger railroads—only two of which are publicly owned, *id.* at 686 n.12—state and local governments are the principal providers of transit services. Transit in San Antonio has been publicly owned and operated since 1959. By 1979, all eighteen municipal transit systems in Texas were publicly owned or operated. Nationally, 94% of all transit riders use public mass transit. By at least 1965, over one-half of all transit employees worked for publicly owned systems.

5. Unlike the Long Island Railroad, which "operated under [the Railway Labor Act] for 13 years without claiming any impairment of its traditional sovereignty," *id.* at 690, SAMTA has never accepted FLSA coverage and promptly brought this lawsuit after the Government ruled that local transit is constitutionally within the FLSA.

B. The Government's all-consuming preoccupation with history conflicts with *LIRR*, which shunned a "static historical view," *id.* at 686, as well as the legacy of Supreme Court decisions construing the Constitution as a living document requiring flexibility to meet changing conditions and values.

The Tenth Amendment, no less than any other part of the Constitution, cannot be shackled by static, historical concepts of state activities. Current realities of urban mass transit clearly entitle transit to *National League* protection.

C. Transit is analogous to the other exempt *National League* activities. Congress has emphasized that transit is as essential as fire and police protection, sewers, and the other protected activities. Similarly, Texas, like many other states, has by law declared public transit authorities to be performing "essential governmental functions", art. 1118x § 6(a), thereby showing that it regards transit "as [an] integral part of [its] governmental activities. . . ." *National League*, 426 U.S. at 854 n.18. Furthermore, transit shares many characteristics common to the activities identified as exempt in *National League*. For example, hospitals have their roots in the private sector and remain a predominantly private-sector activity. Hospital development has been significantly stimulated by federal funding since at least 1946. Garbage collection and parks and recreation have substantial private sector involvement.

The Government disingenuously attempts to distinguish transit from other constitutionally protected activities on the ground that Congress referred to unfair competition in covering public transit. When Congress amended the FLSA in 1966, it specifically stated that it was also including public schools and hospitals in order to prevent unfair competition. The Government relied on this in *Maryland v. Wirtz*, and in *National League* claimed that other state activities (ultimately held traditional by this Court), compete with the private sector. Of course, as a practical matter, there is no competition in urban mass transit, which today is a subsidized public service. Contrary to the Government's claim, transit cannot be distinguished from exempt activities because transit is partially subsidized by user charges since a number of the activities listed in *National League* also collect substantial user fees.

D. It is irrelevant that the federal government, through UMTA funding, allegedly hastened the public takeover of transit systems.

First, neither SAMTA nor its publicly owned predecessor received one cent of federal assistance in acquiring the local transit operations in San Antonio.

Second, any proposition that federal funding of transit permits federal law to displace state law is inconsistent with this Court's holding in *Jackson Transit Authority v. Amalgamated Transit Union Local 1285*, 457 U.S. 15, 27 (1982) that "Congress made it absolutely clear [in UMTA] that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers." The applicability of *Jackson Transit* to this case is underscored by section 13(c) of UMTA, which requires fair and equitable arrangements to protect the interests of employees affected by federal assistance. Nothing in the arrangements between SAMTA and the Government requires FLSA overtime, and they, as well as section 9(d) of UMTA, specifically preclude any other restriction of SAMTA's rights.

Third, the Government is really making a Spending Power argument in a Commerce Clause case. *National League* recognized this distinction, and it is clear from the Court's decision that federal funding is irrelevant in determining whether an activity is protected. However, even if federal funding were relevant, funding of transit is no greater and, in some cases, less than that provided to several of the other activities mentioned in *National League*, at least two of which (hospitals and solid waste management) proliferated under the stimuli of federal financial assistance.

II. Under *National League*, "integral operations in areas of traditional governmental functions" are protected by the Tenth Amendment. 426 U.S. at 852 (emphasis added). Under this standard, transit is also exempt from the FLSA because it is an integral component of the traditional state activity of providing and maintaining means of public transportation. Recent appellate decisions have emphasized that government involvement in building and maintaining roads for public transportation is a traditional activity, even from an historical standpoint. With changing needs and evolving technology, the

States have adopted multifaceted transportation plans that comprise not only road building and maintenance, but mass transit as well.

III. Even if transit were not exempt under *National League*, the FLSA still cannot be constitutionally applied to SAMTA or any state or local government employee absent a constitutionally valid amendment. First, the 1974 amendments to the FLSA purport to cover virtually all state and local government employees by adding "public agenc[ies]" to the definition of "employer" and defining "public agency" as, among other things, "the government of a state or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State." 29 U.S.C. §§ 203(d), 203(x) (1976). In order to make these definitions constitutionally valid, a court would have to add words of limitation to the definitions. The severability clause in the FLSA does not permit the Court to add words to the amendments that are not currently there. Second, the effect of this Court's decision in *National League* is to remove the great majority of state and local government employees from the FLSA. That Act sets up no dichotomy between traditional and nontraditional governmental functions, and to apply the 1974 amendments to the small group of public workers performing nontraditional functions would create a program different from the one Congress actually adopted.

ARGUMENT

I. TRANSIT IS A TRADITIONAL FUNCTION.

In *National League*, this Court held that the States' power to determine their employees' wages, hours and overtime compensation is an "undoubted attribute of state sovereignty." 426 U.S. at 845.* It identified the question before it as whether

* Garcia (brief p. 10) agrees that "*National League of Cities* establishes that the fixing of wages and hours for public employees is 'indisputably [an] attribute[] of state sovereignty.'" The Government's brief (pp. 43-44 n. 34), however, cites *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983), for the proposition that not "every state employment decision . . . should be considered to

determinations of wages, hours and overtime "are 'functions essential to [the States'] separate and independent existence,' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 845-46. The Court discussed the effect the FLSA amendments would have on fire and police protection, but, noting disagreement among the parties as to the "precise effect the amendments will have in application," concluded that "particularized assessments of actual impact are [not] crucial to resolution of the issue presented. . . ." *Id.* at 851. Accord, *EEOC v. Wyoming*, 103 S. Ct. 1054, 1063 (1983).⁹ The Court then held that "application [of

be an exercise of an 'undoubted attribute of state sovereignty.' " (emphasis added). If the Government contends that the "attribute of sovereignty" test is still an issue in FLSA cases, it is ignoring the clear holding in *National League* and is confusing decisionmaking — *e.g.*, the determination of wages and hours in *National League* and forced retirement based on age in *EEOC v. Wyoming* — with the characterization of state activities — *e.g.*, hospitals, transit, etc. — as traditional functions.

⁹ The Government (brief pp. 43-46) challenges the impact FLSA coverage of transit will have on the States. Not only is the Government's discussion of impact inappropriate in view of this Court's decisions in *National League* and *EEOC v. Wyoming*, but it flies in the face of the Government's representation in its brief to the trial court that "allegations of adverse impact are irrelevant to a determination of coverage by the Act." R. 389. *National League* has already decided that the FLSA amendments have sufficient effect on state decisionmaking to preclude their constitutional application to traditional activities because they displace state "choices" regarding the wages and hours of their employees. 426 U.S. at 850. This is evident from the Court's summary, and generic, exemption of most listed activities without any impact analysis. If impact were relevant to a determination of traditionality, then a specific impact analysis would have been required for each of the activities exempted and, presumably, for each government unit providing each type of activity.

Even if impact were considered, application of the FLSA to transit would be foreclosed. The Government recently published a study showing the effect FLSA coverage of transit will have on the States. Advisory Comm'n on Intergovernmental Relations, *Mass Transit and the Tenth Amendment* 23 (1983) ("A labor-intensive industry, labor costs are estimated to comprise anywhere from 65 percent to 73 percent of the operating costs of mass transit. Therefore, any policy affecting labor costs could be expected, correspondingly, to have a profound effect on mass transit finances Strict

the FLSA amendments] will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships" in activities "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851.

Contrary to the Government's position, which is largely premised on decisions of this Court that involved statutes other than the FLSA, concepts of the States' separate and independent existence¹⁰ and a federal-state interest balancing

application of overtime provisions would still add considerably to transit agencies' operating budgets.") See also affidavit of Wayne Cook, R. 203 (peak passenger loads create fluctuating manpower needs during SAMTA's operational hours and require that regular drivers be scheduled for shifts ranging between 8 hours and 8 hours 45 minutes, making it extremely difficult to limit drivers to 8 hour shifts "without seriously disrupting service to transit passengers"). FLSA application would straitjacket local governments into complying with federally imposed requirements, thereby foreclosing the ability to structure essential transit services by making changes in wage and hour policies, as local needs dictate. The possibility that the States may need flexibility to restructure employment practices is portended by the Administration's efforts to eliminate transit operational assistance. See Office of Mgmt. & Budget, Exec. Office of the President, *Major Themes & Additional Budget Details Fiscal Year 1983* at 121-22 ("Budget Details 1983").

¹⁰ The Government's jurisdictional statement (p. 21; see also pp. 10, 25 & brief pp. 16, 21, 33, 34, 43) contends that for public transit to be exempt under *National League*, it must be "an essential aspect of the states' separate and independent existence." The Government has misread *National League*, which posited the question before it as follows:

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are "functions essential to separate and independent existence," [case citation omitted], so that Congress may not abrogate the States' otherwise plenary authority to make them.

426 U.S. at 845-46 (emphasis added).

In answering this question in favor of the States, the Court conclusively decided that the power of the States to make wage and hour determinations

test¹¹ are not a concern in this case since this Court has already resolved these issues in favor of the States for purposes of the FLSA. Rather, after *National League*, the only task remaining for the Court in FLSA cases is to complete the "catalogue of the numerous line and support activities" which are "integral operations in areas of traditional governmental functions." *Id.* at 851 n.16, 852. Thus the issue before the Court is whether

is a function essential to their separate and independent existence and that Congress cannot regulate the States' prerogatives in this area when a traditional activity is involved. The "separate and independent existence" test referred to by the Government is irrelevant in determining whether an activity is traditional, but rather goes to the question whether the particular federal regulatory scheme unconstitutionally impairs state choices that are essential to separate and independent existence—such as, in *National League*, the prerogative to prescribe wages and hours; in *LIRR*, the power to regulate railroad labor relations; and, in *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983), the right to set employment conditions on the basis of age. *National League* has already determined that the FLSA's interference with the States' right to set the wages and hours of public employees "threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking," *EEOC v. Wyoming*, 103 S. Ct. at 1062, thereby endangering the States' separate and independent existence, and that issue accordingly is not present in this case. This is underscored by the fact that parks and recreation could not be exempt under the Government's theory since they are not essential to the States' separate and independent existence; nor could hospitals and refuse collection (sanitation) in view of the substantial private sector involvement in those activities. Similarly, libraries and museums, which the Secretary of Labor has exempted by regulation (29 C.F.R. § 775.4), would not meet the Government's test for immunity. However, even if this were the test, transit would qualify since it is as important to the States as the exempt *National League* activities. See *infra*, pp. 33-38.

¹¹ The Government (brief p. 46) refers to the balancing test, which traces its genesis to Justice Blackmun's concurring opinion in *National League*, 426 U.S. at 856. The Government fails to recognize that this Court has already struck the balance in favor of the States in FLSA cases and that balancing is required only with respect to other federal regulation "such as environmental protection, when the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.* Nothing in *National League* or its progeny suggests that balancing plays any role in determining whether an activity is an integral operation in an area of traditional governmental functions.

SAMTA (and local public mass transit generally) is one of these activities. Transit is not materially different from the other activities exempted in *National League*, and the district court's decision finding transit to be exempt is entirely consistent with *National League* as well as the Court's unanimous decisions in *LIRR* and *Jackson Transit Authority v. Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982).

A. TRANSIT SATISFIES THE TESTS FOR NATIONAL LEAGUE IMMUNITY ARTICULATED IN *LIRR*.

In *LIRR*, the Court held that the Railway Labor Act can be constitutionally applied to a "[state-owned] railroad engaged in interstate commerce," but acknowledged that "under *most* circumstances federal power to regulate commerce [cannot] be exercised in such a manner as to undermine the role of the states in our federal system." 455 U.S. at 685, 686 (emphasis added). Although *LIRR* involved a different statute raising different considerations from the FLSA, the factors upon which the Court's ruling turned support the decision below.

In *LIRR*, the Court focused upon four crucial attributes of railroads, which do not exist in the case of local transit: (1) railroads are part of a national rail network requiring uniform federal regulation; (2) railroads have been subject to comprehensive, long-standing federal regulation; (3) railroads have no comparable history of state regulation; and (4) the railroad in *LIRR* was only one of two state-owned passenger railroads in the United States. The Court also emphasized that the Long Island Railroad voluntarily operated for years under the Railway Labor Act without any claim of disruption. As shown below, each of these elements is inapplicable to transit.

1. Transit Is Not Part Of A National Transportation Network.

In *LIRR*, the Court emphasized the interstate nature of railroads and their role as a component part of the national rail system. The Court noted that the Long Island Railroad "connects with lines of railroads which serve other parts of the

country[,]. . . supplies Long Island's only freight service [and] does a significant volume of freight business." 455 U.S. at 680 n.1. The Court concluded:

[T]he Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. In particular, Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy. A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system. . . .

. . . To allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system.

Id. at 688-89.

In contrast, SAMTA provides a purely local service in Bexar County. Furthermore, during its first two fiscal years, approximately twenty percent of its local line-service passengers were students or children, and another 3.3 million students were carried on nonline service under arrangements with school districts.¹² SAMTA also serves Bexar County hospitals and provides mini-bus service in the downtown area.

Unlike the railroad industry, there is no national transit system; nor has Congress ever concluded that "uniformity" in transit is essential. In fact, the contrary is evident from statements made by the Administration in its effort to eliminate transit operating subsidies:

Primary responsibility for mass transit should remain with State and local governments. *Decisions about service levels, equipment and facilities, fares, wage rates and management practices are better left to local decision-makers.* Excessive levels of Federal assistance unfortunately lead to excessive Federal interference in these local decisions.

¹² In this respect, SAMTA is engaged in an activity integral to education.

Budget Details 1983 at 121 (emphasis added). Any disruption of a transit system is a purely local problem which, unlike an interstate railroad, has no impact on other transit systems serving other localities.¹³

The Government's reference in its brief (pp. 33, 36) to UMTA's characterization of the decline of transit services as a "national problem" and the Government's portrayal of public transit as a "venture in 'cooperative federalism'" between the States and federal government does not enhance its position one whit since Congress has passed laws and made the same observations about virtually all of the other activities exempted by *National League*.¹⁴ Examples are:

Health and Hospitals: Safe Drinking Water Act establishes a "joint Federal-State system for assuring compliance with

¹³ The Government (brief p. 47) claims that because transit impacts "interstate commerce the FLSA may constitutionally be applied to public transit employees." This logic is specious and circular. If the Government did not claim a nexus between transit and interstate commerce, the FLSA could not be applied to transit. Furthermore, in amending the FLSA to encompass virtually all public employees in 1974, Congress emphasized the impact on interstate commerce of state and local government activities. See, e.g., S. Rep. No. 93-690, 93d Cong., 2d Sess. 24 (1974). See also *Maryland v. Wirtz*, 392 U.S. 183, 194-95 (1968) (finding that public schools and hospitals affect commerce). The constitutional question arose in *National League* only because the regulated state activities affected commerce. See *id.* 426 U.S. at 840-41.

¹⁴ For the same reason, the Government's reliance (brief pp. 14, 32, 46-47) on the fact that some transit systems are "areawide" and some "cross state lines" is misplaced since the same can be said of activities expressly protected by *National League*. E.g., S. Rep. No. 96-96, 96th Cong., 1st Sess. 33-34, reprinted in 1979 U.S. Code Cong. & Ad. News 1306, 1338-39 (of 205 health service areas, 15 are interstate, one is tristate and 13 encompass interstate SMSA's); S. Rep. No. 11, 88th Cong., 1st Sess. 5, reprinted in 1963 U.S. Code Cong. & Ad. News 664, 667 (Secretary of the Interior should "encourage interstate and regional cooperation in the planning, acquisition, and development of outdoor recreation resources"); Am. Pub. Works Ass'n, *History of Public Works in the United States 1776-1976* at 416, 418 (1976 ["History of Public Works"]) ("[i]nterstate compacts have offered a more effective means of promoting regional water pollution control" . . . the 1948 Water Pollution Control Act provided for "interstate cooperation"); H.R. Rep. No. 899, 89th Cong., 1st Sess. 8, 27, reprinted in 1965 U.S. Code Cong.

these standards" (H.R. Rep. No. 93-1185, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6454, 6455). National Health Planning & Resources Development Act of 1974 will "assure the development of a national health policy"; Hill-Burton Act, providing for hospital construction, was a "Federal-State partnership"; "national guidelines" for health planning are needed; it is the "responsibility of the Federal government to intervene" to upgrade large urban hospitals (S. Rep. No. 93-1285, 93d Cong., 2d Sess. 1, 19, 42, 59, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7842, 7859, 7882, 7898).

Sanitation: Solid Waste Disposal Act requires that "immediate action must be taken to initiate a national program directed toward finding and applying new solutions to the waste disposal problem"; "[t]he problem of solid waste disposal is all-pervasive and has become national in scope . . . [and] will require the combined resources of the Federal, State, and local governments as well as industry and research institutions" (H.R. Rep. No. 899, 89th Cong., 1st Sess. 7, 22, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3608, 3614, 3627). "[P]roblems of waste disposal . . . have become a matter national in scope" (Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6901(a)(4) (Supp. V 1981)).

Education: The "purpose" of the Elementary & Secondary Education Act of 1965 "is to meet a national problem" (S. Rep. No. 146, 89th Cong., 1st Sess. 4, *reprinted in* 1965 U.S. Code Cong. & Ad. News 1446, 1449).

Fire: "Fire is a major national problem" (S. Rep. No. 93-470, 93d Cong., 1st Sess. 6, *reprinted in* 1974 U.S. Code Cong. &

& Ad. News 3608, 3615, 3634 (federal financial assistance is needed to encourage and help the states and interstate agencies undertake surveys of **solid waste** and develop plans on a "statewide or interstate basis" . . . "interstate and interlocal cooperation" is needed); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1288(a)(3) (1976) (providing for "areawide **waste treatment** management plans" for multistate areas); Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6946(c) (1976) (providing for "interstate [**solid waste** disposal] regions"); **Crime Control** Act of 1973, Pub. L. No. 93-83, 87 Stat. 197, 200 (1973) (amended 1979) (providing for "interstate metropolitan regional planning units").

Ad. News 6191, 6196). The federal government is a "partner in attaining" the goal of improving the quality of local fire service delivery (Advisory Comm'n on Intergovernmental Relations, *The Federal Role in Local Fire Protection* 18 (1980)).

Police: "Crime is a national catastrophe"; "[t]here are certain national objectives which are vital to every citizen of this country, and the elimination of crimes is one of the foremost among these objectives" (S. Rep. No. 1097, 90th Cong., 2d Sess. 31, 179, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2117, 2239). The role of the Law Enforcement Assistance Administration is a "partner with State and local governments" (S. Rep. No. 91-1253, 91st Cong., 2d Sess. 14, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5804, 5805).

Each of these "national" problems has received congressional attention and support. Yet, each is exempt from FLSA coverage.

2. Transit Has Not Been Subject To Comprehensive And Long-Standing Federal Regulation.

In *LIRR*, the Court relied heavily on the fact that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century." 455 U.S. at 687. The Court concluded that "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas *traditionally subject to federal statutory regulation*." *Id.* (emphasis added).

Unlike the "national rail system," *id.* at 688, federal regulation of transit has been no greater than that governing the activities specifically exempted by *National League*. There is no scheme of federal regulation designed to provide uniformity among transit systems, as in the case of railroads, which are subject to an array of industry-specific federal laws.¹⁵ The Government's claim (brief pp. 39-43) that federal regulation of

¹⁵ In addition to the statutes cited in *LIRR*, there are many other federal regulatory statutes directed exclusively at railroads. Title 45 of the U.S. Code deals solely with railroads.

transit distinguishes that service from the activities held constitutionally protected in *National League* finds no support in the federal statutes it cites and in fact underscores the minimal federal regulatory role in the transit field.

The National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* (1976 & Supp. V 1981), and therefore the Labor-Management Reporting & Disclosure Act, 29 U.S.C. § 401, *et seq.* (1976 & Supp. V 1981) (see definition of "employer," *id.* § 402(e)), apply to the activities specifically exempted in *National League* when performed by private sector employers. **E.g., Hospitals¹⁶:** *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). **Schools:** *Cornell University*, 183 NLRB 329 (1970). **Fire and Police Protection:** *Florence Volunteer Fire Department, Inc.*, 265 NLRB No. 134 (1982); *Pinkerton's National Detective Agency, Inc.*, 90 NLRB 532 (1950). **Sanitation:** *Dale Service Corp.*, 263 NLRB No. 114 (1982) (sewage treatment); *Nichols Sanitation, Inc.*, 230 NLRB 834 (1977) (garbage collection); *Oakland Scavenger Co.*, 98 NLRB 1318 (1952) (same). **Recreation:** *Coney Island, Inc.*, 140 NLRB 77 (1962); *Union News Co.*, 112 NLRB 584 (1955) (ice skating rink). *See also* *Management Services, Inc.*, 108 NLRB 951 (1954) (municipal services).

A law of general application that regulates virtually every private employer in the country, including those *National League* activities (*e.g.*, hospitals, schools and sanitation) that have substantial private sector involvement, cannot be equ-

¹⁶ Hospitals, including nonprofit ones, were covered by the NLRA when it was originally enacted. *NLRB v. Central Dispensary & Emergency Hosp.*, 145 F.2d 852 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 847 (1945). In 1947, the NLRA was amended to exempt nonprofit hospitals, Labor Management Relations Act, ch. 120, 61 Stat. 136, 138 (1947), and thereafter the NLRB asserted jurisdiction over company hospitals. *E.g.*, *General Elec. Co.*, 89 NLRB 1247 (1950). In 1974, Congress deleted the exemption for nonprofit hospitals and incorporated special provisions in the NLRA directed specifically at the hospital industry. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 396 (1974). *See generally* S. Rep. No. 93-706, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 3946.

ated with the comprehensive federal statutes specifically regulating railroads. In view of the almost universal applicability of the NLRA, the Government's argument would impose the "static historical view of state functions" shunned by this Court in *LIRR*, 455 U.S. at 686, since any new activity undertaken by a state—no matter how necessary or important—would be denied Tenth Amendment protection if it was previously performed to any degree by the private sector. This would render meaningless the Court's *LIRR* holding that only state acquisitions that "erode federal authority" are not protected. *Id.* at 687. Furthermore, as noted by the district court (Gov't J.S. 9a), the NLRA "contains an exemption for state and local governments." It would indeed be anomalous to deny Tenth Amendment protection to the States based upon a statute that Congress specifically decreed shall not apply to the States. Contrary to the Government's assertion (brief p. 40), a state acquiring a transit system, or any other private entity, does so knowing that it will *not* be subject to the NLRA.

The Government also relies on the fact that the Equal Pay Act (29 U.S.C. § 206(d) (1976)) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.* (1976 & Supp. V 1981)) apply to transit. This logic is circular because those same statutes apply to public employers providing activities exempted by *National League*. *E.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (upholding Title VII's application to the States); *Pearce v. Wichita County Hospital Board*, 590 F.2d 128 (5th Cir. 1979) (applying Equal Pay Act to a public hospital).

The Government's reliance on the 1961 and 1966 FLSA amendments is misplaced. Private transit systems were by statute exempt before 1961, and therefore during its first twenty-three years, the FLSA was totally inapplicable to transit. The 1961 amendments extended the FLSA only to private systems with revenues exceeding one million dollars, but exempted all employees from the overtime requirements. Even the 1966 amendments continued the overtime exemption for operators and excluded systems whose rates or services are

not subject to regulation by a state or local agency.¹⁷ It was not until 1976 that even private transit was brought fully under the FLSA's overtime requirements, but this was pursuant to the 1974 amendments, whose constitutionality is challenged in this very action, and which cannot provide bootstrap support for the Government's position. The vast majority¹⁸ of transit employees have been subject to the full play of the FLSA only since 1976, and this hardly constitutes long-standing or comprehensive federal regulation of wage and hour practices or any other aspect of transit operations.

3. There Is Long-Standing State Regulation Of Transit.

In holding the Long Island Railroad to be nontraditional, the Court also relied upon the fact that "[t]here is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry."¹⁹ 455 U.S. at 688. The reverse is true of transit in Texas and San Antonio.

State and local regulation of street transportation in Texas dates back at least 70 years. In 1913, the Texas legislature

¹⁷ The Government's claim (brief p. 40) that "90% [of all transit systems] were still privately owned in 1967" is misleading. In 1965, 56% of all transit workers in the United States were employed by publicly owned systems, which means that a majority of transit employees in the country were not covered by the FLSA or the NLRA. *Amendments to the Fair Labor Standards Act: Hearings on S. 763, et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare, 89th Cong., 1st Sess. 309 (1965) ("Hearings on S. 763")*.

¹⁸ See Garcia Appendix below at 62, which shows that during SAMTA's first fiscal year, about 69% of its payroll went to operators.

¹⁹ The Government's argument (brief pp. 21-24) that a "history of state regulation of private transit" is not an appropriate consideration thus improperly disregards an important element of the test for immunity articulated in *LIRR*. Furthermore, the Government's claim (brief pp. 23-24) that the States made a "fundamental policy decision to pursue their objectives through regulation of nongovernment transit providers" is plainly wrong and is refuted by the very data cited in the Government's own brief (p. 17) that publicly owned transit systems carry over 94% of all transit riders.

delegated to the cities exclusive control over their streets and highways, including the powers:

To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to provide for the giving bond or other security for the operation of the same.

To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire. . . .

1913 Tex. Gen. Laws, ch. 147, § 4, at 314, *as codified*, Tex. Rev. Civ. Stat. Ann. art. 1175 §§ 20, 21 (Vernon 1963).

In 1915, the City of San Antonio passed a comprehensive ordinance to regulate vehicles operated for hire to transport passengers. San Antonio, Tex., Ordinance OF1-1 (Mar. 8, 1915). The ordinance required owners of vehicles, including motor buses, to obtain a franchise from the City for transporting passengers for hire on city streets; established license application and fee specifications and insurance or bond requirements; and specified vehicle safety features such as lighting, speed and driver age and conduct. Another comprehensive ordinance was enacted in 1921, updating the 1915 ordinance and including a designated motor bus route and terminals. San Antonio, Tex., Ordinance OF-266 (Dec. 1, 1921).

The City continued to regulate fares, routes, schedules and franchises of private transit companies until 1959, when it created SATS and purchased the assets of SATS' predecessor pursuant to a state law authorizing cities to issue bonds for the purchase, construction or improvement of street transportation systems. Tex. Rev. Civ. Stat. Ann. art. 1118w (Vernon 1963 & Supp. 1982-83). Public mass transit in San Antonio changed again after state legislation in 1973 authorized a change from a municipal to a metropolitan facility and specifically designated publicly owned transit systems as performing "essential governmental functions." Art. 1118x, § 6(a). See

also §§ 6(p), 6C(a), 13A.²⁰ The history of transit in San Antonio, from a city-controlled private franchise, to a city-owned system in 1959, to an autonomous metropolitan authority in 1978, illustrates the traditional role of the city and state in ensuring efficient transportation for the convenience and welfare of local citizens.²¹

4. State And Local Government Are The Principal Providers Of Transit.

In finding the Long Island Railroad not to be a traditional function, this Court noted that only two of seventeen commu-

²⁰ Other Texas statutes regulating intracity bus systems include Tex. Rev. Civ. Stat. Ann. art. 1015 (Vernon 1963) (authorizing cities to license, tax and regulate omnibus drivers); art. 1181 (Vernon Supp. 1982-83, *original version* at 1913 Tex. Gen. Laws, ch. 147, § 9, at 317) (confirming that cities have exclusive power to grant franchises for the use of public streets); art. 6663c (Vernon 1977 & Supp. 1982-83) (authorizing state assistance to cities for establishment of mass transit systems); art. 6675a-2 (Vernon 1977) (providing for registration of motor vehicles); art. 6675a-5 (Vernon Supp. 1982-83) (setting annual license fees for street and suburban buses); art. 6675a-13 (Vernon 1977) (establishing license plate requirements for motor vehicles); art. 6687b, § 5 (Vernon 1977) (establishing requirements for drivers of school buses); art. 6698 (Vernon 1977) (authorizing towns to collect city permit fees on motor vehicles transporting passengers for hire).

²¹ Unlike the States' virtually unencumbered power to regulate transit, the States are forbidden from regulating many aspects of interstate railroads. In *LIRR*, 455 U.S. at 687, this Court cited *Wabash, St. L. & P. Ry. v. Illinois*, 118 U.S. 557 (1886) (states cannot regulate interstate freight rates). Other examples include *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (regulation of train length); *Transit Comm'n v. United States*, 289 U.S. 121 (1933) (regulation of trackage agreements); *Colorado v. United States*, 271 U.S. 153 (1926) (prohibiting abandonment of lines); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926) (regulation of locomotive equipment); *Missouri, Kan. & Tex. Ry. v. Texas*, 245 U.S. 484 (1918) (regulation of departure times and length of connection time); *Erie R.R. v. New York*, 233 U.S. 671 (1914) (limitation on employee hours of service); *Herndon v. Chicago, R. I. & P. Ry.*, 218 U.S. 135 (1910) (requirement that trains stop at all junction points); *Houston & Tex. Cent. R.R. v. Mayes*, 201 U.S. 321 (1906) (requirement that railroads provide cars for delivery of freight); *Illinois Cent. R.R. v. Illinois*, 163 U.S. 142 (1896) (requiring diversion of trains to the county seat); *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465 (1888) (prohibition against transport of intoxicating liquors into the state without proper certificate).

ter railroads in the United States were public. One of those was the Long Island itself, which was converted from a "private stock corporation to a public benefit corporation" in 1980. 455 U.S. at 681. The other was the Staten Island, which became public in 1971. *Id.* at 686 n.12. See also *Employees v. Missouri Department of Public Health & Welfare*, 411 U.S. 279, 285 (1973) (state-owned railroad in *Parden v. Terminal Ry.*, 377 U.S. 184 (1964) was "a rather isolated state activity").²²

Although transit services were once predominantly provided by the private sector, this has not been true for many years. The rudimentary street transportation of the first half of this century has evolved into a new mass transit technology serving entire urban areas.²³ The States have recognized that modern transit services cannot be operated profitably and constitute a service as essential to survival as fire and police. In order to ensure the continuation of vital transit services, the States, of necessity, have added transit as a component part of the array of "governmental services which their citizens require," *National League*, 426 U.S. at 847, and have been the principal provider of transit services for many years.²⁴

²² Commuter railroads are not considered part of mass transit. "The urban transit industry includes all 'companies and systems primarily engaged in local and suburban mass passenger transportation over regular routes and on regular schedules' except computer railroads and limousine service. . . ." Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Indus. & Lab. Rel. Rev. 95 (1971) (emphasis added).

²³ The Government's reliance (brief p. 20) on footnote 11 in *LIRR*—in which the Court stated that a state-operated common carrier would be subject to Commerce Clause regulation—untenably stretches the Court's statement. The cited portion of that footnote is a quotation from Chief Justice Burger's concurring opinion in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978), which in turn was derived from *United States v. California*, 297 U.S. 175 (1936). That case involved the Federal Safety Appliance Act, 45 U.S.C. § 1, *et seq.* (1976 & Supp. V 1981), which covers "common carrier[s] engaged in interstate commerce by railroad," (emphasis added). Both textual sentences surrounding footnote 11 in *LIRR* pertain to railroads, and it would appear that the Court's reference to common carriers also pertained to railroads.

²⁴ A major premise of Garcia's brief is that publicly owned transit systems constitute business enterprises. Garcia's assertion is belied by the experience of the past quarter century. Congress enacted UMTA because "in

Local transit in San Antonio has been publicly owned and operated since 1959. By 1979 all eighteen municipal transit systems in Texas operating five or more vehicles in scheduled, fixed route, intracity service were publicly owned or operated. Tex. Dep't of Hwys. & Pub. Transp., *1979 Texas Transit Statistics 1* (1980). Nationally, 94% of all transit riders use public mass transit. APTA, *Transit Fact Book 1981* at 27.

The figures in the Government's brief (pp. 17-18) showing that roughly half of the 686 transit systems in urban areas over 50,000 population are public is misleading since those 686 systems include the smallest, with only one bus, and the largest with over 2000 buses. The publication from which these figures are taken reflects that the principal provider of transit services in each of the 25 largest urban areas in the United States and in at least 100 of the 106 urban areas having populations exceeding 200,000 is public. U.S. Dep't of Transp., *Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* (1981) ("*DOT Directory*"). The Government's claim (brief p. 49) that "in 1966 . . . transit service was, by any measure, still predominantly a service provided by private enterprise" is repudiated by its own brief (p. 17), which states that "[i]n 1967 over 50% of all transit riders patronized publicly owned systems." Furthermore, by 1965, 56% of all transit employees worked for publicly owned systems. *Hearings on S. 763* at 309.²⁵

recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten continuation of this essential public service. . . ." 49 U.S.C. § 1601b(4) (1976). In San Antonio, SAMTA's fare box receipts are less than 25% of its operating expenses. According to the Government's own brief (p. 49 n.37), nationally fares constitute 40.7% of operating revenues. Just to break even on expenses, transit fares would have to increase several fold—to the detriment of the poor, the elderly and minorities, who constitute the greatest group of transit patrons. For transit to try to operate as a business enterprise would sound its death knell.

²⁵ The Government's attempt (brief p. 19) to equate the histories of public mass transit and passenger railroads conflicts with the position it took in its amicus brief in *LIRR*. For example, on page 12 of that brief, the Government

5. SAMTA Has Never Acceded To FLSA Coverage.

In *LIRR*, the Court relied on the fact that the "State knew of and accepted" the Railway Labor Act and "operated under [it] for 13 years without claiming any impairment of its traditional sovereignty." 455 U.S. at 690: When the Long Island Railroad was sued for a declaratory judgment that the Railway Labor Act applied, its response "was to acknowledge that the Railway Labor Act applied." *Id.* Then, while the suit was pending, it converted to a public benefit corporation "apparently believing that the change would eliminate Railway Labor Act coverage and bring the employees under the umbrella of the Taylor Law." *Id.* at 681.

Unlike the Long Island Railroad's acceptance of the Railway Labor Act, SAMTA has never accepted FLSA coverage of its operations. When the Deputy Wage and Hour Administrator issued his September 17, 1979 ruling that local transit is constitutionally within the FLSA, SAMTA promptly brought this action challenging the ruling.

B. AS A "LIVING DOCUMENT," THE CONSTITUTION MUST BE GIVEN FLEXIBILITY TO MEET CHANGING TIMES, AND THEREFORE CONSTITUTIONAL DOCTRINE REGARDING STATE ACTIVITIES CANNOT BE SHACKLED BY STATIC, HISTORICAL CONCEPTS.

The Government (brief p. 25) states that it "take[s] the teaching of *Long Island R.R.* to be that primacy is assigned to

insisted that the Long Island Railroad "remains a railroad—an integral part of the interstate railroad industry and *plainly distinguishable from conventional intraurban transit systems.*" (emphasis added). The Government contended that this distinction "is firmly grounded in the separate histories of these two sectors of the transportation industry, in the applicable law, and in the usages of the industry," *id.* at 25 n.19, and contrasted the 2 public commuter railroads (out of 17) with the more than 1000 transit systems in the United States, "nearly half of [which], including most of the largest ones, carrying a total of 91% of all transit passengers, were owned by public agencies." *Id.* at 27 n.20. The Government cited these statistics in support of its contention that "public ownership and operation of conventional transit systems is substantially better established than is such operation of commuter railroads." *Id.*

historical evidence in the Tenth Amendment analysis” Later in its brief (p. 50) the Government attempts to denigrate any analysis that is not based strictly upon historical considerations as amounting to “creeping unconstitutionality.” The Government’s inflexible preoccupation with history and its refusal to acknowledge that changing societal values and technological innovations play an important role in constitutional analysis is directly repudiated by this Court’s rejection in *LIRR* of a “static historical view of state functions generally immune from federal regulation.” 455 U.S. at 686. It is also diametrically opposed to the constitutional jurisprudence established by this Court, which has emphasized that “the Constitution has been treated as a living document adaptable to new situations.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 681 (1952) (Vinson, C.J., dissenting). As Chief Justice Marshall stated in *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) over 150 years ago:

This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future times, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

See also Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 698-99 (1976) (“Because of the general language used in the Constitution, judges should not hesitate to use their authority to make the Constitution relevant and useful in solving the problems of modern society.”)²⁶

²⁶ The same principles appear in Eighth Amendment cases. *E.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972) (p. 327: “[T]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a

This Court has recognized that the concept of a living constitution has particular applicability to the evolving role of the States in serving the needs of their citizens. For example, in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), Justice Rehnquist emphasized that "[v]iable local government may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions." *Id.* at 75 (quoting *Sailors v. Board of Education*, 387 U.S. 105, 110-11 (1967)). See also *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("[T]here cannot be any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental [T]he people—acting . . . through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.").

Consistent with the concept that the Tenth Amendment is not a static reservation of those States' rights existing when our forefathers enacted the Bill of Rights, we must consider publicly owned mass transit "in the light of its full development and its present place in American life throughout the Nation." *Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954). When viewed in its present developed stage—where 94% of all passenger trips are on publicly owned transit systems, where

maturing society.'" [Marshall, J., concurring]) (p. 382: The Amendment's "applicability must change as the basic mores of society change." [Burger, C.J., dissenting]) (p. 408: "[T]he Cruel and Unusual Punishments Clause 'may acquire meaning as public opinion becomes enlightened by a humane justice.'" [Blackmun, J., dissenting]) (p. 420: "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and to gain meaning through application to specific circumstances, many of which were not contemplated by their authors." [Powell, J., dissenting]); *Weems v. United States*, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth."))

local citizenry demand efficient, low cost mass transportation services as an essential governmental service, and where the private sector cannot provide this service—it should be clear beyond peradventure that publicly owned mass transit is within the protective umbrella of the Tenth Amendment.

Perhaps most apposite to transit are the Court's observations in *Brush v. Commissioner of Internal Revenue*, 300 U.S. 352 (1937), tracing the evolution of private water service into an essential function of government:

We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions

We find nothing that detracts from this view in the fact that in former times the business of furnishing water to urban communities, including New York, in fact was left largely, or even entirely, to private enterprise. The tendency for many years has been in the opposite direction, until now in nearly all the larger cities of the country the duty has been assumed by the municipal authorities. Governmental functions are not to be regarded as non-existent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are none the less so because the use of them has had a recent beginning.

Id. at 370-71.

Although public transit, like water service, was once largely a private function, it has evolved into an essential function of state and local government, and this Court's conclusions are no less applicable to transit today than they were to water service forty-seven years ago.²⁷ See also *Amersbach v. City of Cleve-*

²⁷ For this reason, *Helvering v. Powers*, 293 U.S. 214 (1934), relied upon by the Government (brief pp. 18-19), is inapposite. *Powers* was written 50 years ago when public transportation was in its formative stage and mass transit as we know it today did not exist. As the Court noted at the time, public operation of a street railway was "a departure from usual governmental functions." *Id.* at 225 (emphasis added). Just as the provision of water passed from the private sector into an essential governmental service in *Brush*, transit has become a vital service provided almost exclusively by the

Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979) (extending FLSA immunity to a municipal airport and holding that the "terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times").

C. TRANSIT IS ANALOGOUS TO THE OTHER STATE ACTIVITIES HELD EXEMPT IN *NATIONAL LEAGUE*.

As noted by the district court, "[a]nalogy to the non-exclusive list of traditional state functions set out in *Usery* is one method of testing for Tenth Amendment immunity." Gov't J.S. 11a. Whether transit is compared to these activities generally or to the specific characteristics of those activities that are predominantly user-related—*e.g.*, hospitals, sanitation, and parks and recreation—it is clear that transit cannot be distinguished for Tenth Amendment purposes.

1. Congress has emphasized the reality that transit is as essential as fire and police protection and other vital services. For example, during hearings in 1960 on mass transit legislation, Congressman Addonizio stated:

It is as necessary to provide transportation for these new communities as it is to provide other public necessities such as water, sewers, police and fire protection, and so forth.

Hearings Before Subcomm. No. 1 of the Comm. on Banking & Currency of the House of Representatives on Metropolitan Mass Transportation Legislation, 86th Cong., 2d Sess. 14

States as an "integral part[] of their governmental activities," *National League*, 426 U.S. at 854 n.18, and as a "service[] which their citizens require," *id.* at 847. Today, the States provide transit as a matter of public necessity rather than by choice, and they clearly are not "running . . . a business enterprise" or conducting a "business activit[y] which [has] as [its] aim the production of revenues in excess of costs," *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 418 n.1, 424 (1978) (Burger, C.J., concurring). See also *Helvering v. Gerhardt*, 304 U.S. 405, 418 (1937) (noting that "the state function affected [in *Powers*] was one which could be carried on by private enterprise . . .").

(1960). During the same hearing, this message was echoed by Congressman Corbett:

It is a vital public necessity that such service be provided, as necessary to economic life of the community as the provision of water, police, and fire protection and other recognized public necessities.

Id. at 26. Again in 1973, the essential nature of public transportation was emphasized:

Public transportation is as necessary to the life of the community as fully tax-supported services. In some ways it is even more essential. Potato peelings can be buried in the back yard or composted, but people cannot walk six miles to work every day.

119 Cong. Rec. 4242 (1973). One year later, Senator Biden compared mass transit to the fire department and hospitals:

In any case, I believe it is the duty of the Government to provide such subsidies as are needed because I think mass transit is as much an essential public service as the fire department or hospitals.

120 Cong. Rec. 1042 (1974). *Accord*, 119 Cong. Rec. 4474 (1973) (remarks of Congresswoman Abzug: "transit . . . is as much of an essential service for working people as is police protection"); 120 Cong. Rec. 28,430 (1974) (remarks of Congressman Anderson: "[P]apid transit benefits everyone, and it should be thought of, I believe, as a public service, just as police and fire protection are to benefit everyone."). *See also* UMTA, 49 U.S.C. § 1601b (1976).

2. It is also clear that the States regard transit "as [an] integral part[] of their governmental activities," which is another test for *National League* immunity. 426 U.S. at 854 n.18. Article 1118x provides that metropolitan transit authorities are "essential governmental functions" and are not "proprietary." *Id.* §§ 6(a), 13A. Article 6663c, § 1(a)(2), Tex. Rev. Civ. Stat. Ann. (Vernon 1977) provides that "public transportation is an essential component of the state's transportation system . . ." Examples of "other state laws decreeing public mass transit to be an essential function of government" are cited in the district court's memorandum opinion.

Gov't J.S. 12a n.7. All such laws predated this Court's decision in *National League*.

3. Closer comparison of transit with some of the specific activities exempted in *National League* underscores the propriety of the decision below. For example, public sector involvement in hospitals is not as well established as in the transit field. In 1980, of this nation's 7,051 hospitals, only 2,562 (36%), including federal facilities, were under government control. Bureau of Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1982-83* tab. 171, at 111 (1982) ("*Statistical Abstract*"). By comparison, in 1981, 598 (58%) of the 1,025 transit systems of all sizes were owned by state or local governments.²⁸ In 1981, about 30% of all hospital beds were in state or local government hospitals, Am. Hosp. Ass'n, *Hospital Statistics* tab. 4A, at 14 (1982), whereas, in 1980, 90% of all transit vehicles were publicly owned or leased, APTA, *Transit Fact Book 1981* tab. 3, at 43. A 1965 Senate hearing report states that "[t]here are 79 cities in which the dominant transit system is publicly owned and operated . . . [and whose] employees . . . represent approximately 56% of the total employees in the local transit industry." *Hearings on S. 763* at 309. In contrast, almost 10 years later, "56 percent of all hospital employees" worked for "non-profit, non-public hospitals." S. Rep. No. 93-766, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Ad. News 3946, 3948.²⁹ Hospitals have

²⁸ DOT Directory 19; U.S. Dep't of Transp., *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service* 13 (1981).

²⁹ The Government (brief pp. 36-37 & n.30) attempts to distinguish hospitals from transit on the ground that although "[t]he largest sector of the hospital industry undoubtedly is in private hands," most hospitals are non-profit rather than proprietary. The Government's rationalization disintegrates when one considers that Congress specifically covered nonprofit hospitals in the 1966 FLSA amendments to eliminate their unfair competitive advantage over proprietary hospitals:

Hospitals and related institutions, such as schools and colleges, which are not proprietary, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities

their roots in the private sector and to this day are primarily private:

The hospitals established in the eighteenth and nineteenth centuries were constructed and run by proprietary groups and church and other nonprofit organizations. This form of ownership remains the predominant characteristic of United States medical facilities.

History of Public Works 490.

Federal funding has also played a significant role in the development of hospitals. Before 1946, more than 1,000 counties in the nation had no health facilities at all. A. Treloar & D. Chill, *Patient Care Facilities: Construction Needs and Hill-Burton Accomplishments* 11 (1961). In 1946, the Hill-Burton Act, Pub. L. No. 79-725, 60 Stat. 1041 (1946) (*current version at* 42 U.S.C. § 291, *et seq.* (1976 & Supp. V 1981)), was passed to improve the situation, and more than half of hospital construction accomplished under that Act has been in areas with no hospital facilities. Treloar, *supra*, at 12, 14. "[R]oughly, 42 per cent of the county hospitals in operation in 1956 opened" after the end of World War II, and "[u]ndoubtedly, much of this latter growth was due to the federal grants for hospital construction received under the terms of the Hill-Burton Act of 1946. . . . In the state of Texas alone, fifty-three such institutions were founded in the interval from 1946 to 1956." J. Hamilton, *Patterns of Hospital Ownership and Control* 76 (1961).

carried on by enterprises organized for a common business purpose. Failure to cover all activities of these nonprofit hospitals, schools or institutions will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which "constitute an unfair method of competition in commerce."

H.R. Rep. No. 871, 89th Cong., 1st Sess. 15 (1965). See also 120 Cong. Rec. 12,938 (1974) (remarks of Congressman Williams regarding the 1974 amendments to the NLRA: "Private nonprofit hospitals should at least be subject to the same regulations, obligations, and rights that apply to proprietary hospitals. There is virtually no difference between employees of profit and of nonprofit hospitals.")

In its brief (p. 18), the Government notes that some public transit systems have management contracts with outside concerns.³⁰ The same arrangement exists with hospitals. In 1980, investor-owned firms held 150 management contracts with city or county hospitals. *City, County Contracts Lead to Hospital Sales*, *Modern Healthcare*, Sept. 1980 at 44. The most rapid growth in this area has occurred in municipal and county owned facilities such as the 1,300-bed Cook County Hospital in Chicago, J. Goldsmith, *Can Hospitals Survive?* 114 (1981), and the 1,465-bed John J. Kane Hospital in Pittsburgh, Mannisto, *For-Profit Systems Pursue Growth in Specialization and Diversification*, *Hospitals*, Sept. 1, 1981 at 72. Moreover, unlike transit systems, which have become predominantly publicly owned, many public hospitals are selling out to private operators. Hull, *How Ailing Hospital in South Was Rescued by a For-Profit Chain*, *Wall St. J.*, Jan. 28, 1983, at 1, col. 1. Furthermore, hospitals have long been subject to the very same statutes cited by the Government as regulating transit. In fact, when *National League* was decided, there had been more extensive FLSA coverage of hospitals and schools since both activities were brought totally under the FLSA in 1966, whereas public transit was given an overtime exemption for operating employees until 1976 and transit systems whose fares or services were not subject to regulation by a state or local agency were not covered at all. Yet, this Court had no difficulty in exempting both hospitals and schools under the Tenth Amendment.³¹

³⁰ The Government's brief (p. 18) incorrectly asserts that "more than 120" publicly owned transit systems are privately managed. The Government's source, the *DOT Directory*, shows that 123 systems have management contracts and that 31 of these are privately owned systems. *Id.* pp. 2-19.

³¹ The fact that Congress specifically included public schools and hospitals in the 1966 FLSA amendments singularly destroys the Government's attempt (brief p. 44) to distinguish transit from the expressly exempt *National League* activities on the ground that the "public transit provisions are carefully targeted at a discrete function"

Facts about the exempt activity of solid waste collection (sanitation) provide analogous reenforcement for the Tenth Amendment immunity of public transit. Garbage collection at the White House has been by a private purveyor since the days of President John Adams. *History of Public Works* 433. In 1975, private firms collected residential refuse in 67% of 2,060 cities of all sizes surveyed, 61.4% of which relied entirely on private firms. E. Savas, *The Organization and Efficiency of Solid Waste Collection* 45, 63 (1977). "Waste disposal is one of today's hot new glamour industries . . . [which] has become a \$10 billion business" Blyskal, *Glittering, Glamorous Garbage*, *Forbes*, June 8, 1981 at 156. See also *History of Public Works* 400 ("[m]ost of the early sewers were built with private capital"; "[r]emoval and disposition of sanitary waste was regarded as a private responsibility"; "private contractors cleaned cesspools and privies").

Data about parks and recreation also support SAMTA's position. According to a 1965 survey, 85,000 commercial enterprises provided outdoor recreational opportunities on 23 million acres, 46,000 more provided outdoor recreation facilities related to amusement and spectator sports on 18 million acres, and one million nonprofit enterprises were provided by 47,000 private and quasi-private nonprofit organizations on 7 million acres. *History of Public Works* 553, 554. See also *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 n.8 (1978) (recreational parks are not an "exclusively public function"). Golf courses had their genesis in the private sector as private clubs, 10 *Encyclopaedia Britannica Golf* 500-01 (1947), and in 1981 only about 15% of all golf courses in the United States were municipal, *Statistical Abstract* tab. 400, at 235.³²

³² The Government's decision to exempt other activities not mentioned in *National League* reinforces SAMTA's position. For example, museums, although an important part of our cultural heritage, are not essential to the continued vitality of our urban areas. In 1975, 56% of the country's museums were run by private, nonprofit organizations, 34% were government run and 10% were governed by educational institutions. Nat'l Research Center of the Arts, Inc., Nat'l Endowment for the Arts, *Museums USA: A Survey Report* 13 (1975). The Government also ruled that a home for the retarded is exempt

4. A recurring, but disingenuous, theme of the Government's brief (pp. 20, 36 n.29, 46, 47, 48 n.37) is that transit can be distinguished from the activities exempted in *National League* because Congress extended the FLSA to public transit to prevent unfair competition with the private sector. On page 20 of its brief the Government has quoted an incomplete and misleading excerpt from the House and Senate reports. The full text of the quoted paragraph shows that Congress was also addressing unfair competition by public hospitals and schools:

In addition to the amendment to section 3(s) of the act, section 3(r), which defines "enterprise," is amended to make plain the intent to bring under the coverage of the act employees of hospitals and related institutions, schools for physically or mentally handicapped or gifted children, or institutions of higher education, whether or not any of these hospitals, schools, or institutions are public or private or operated for profit or not for profit. Section 3(r) of the act is further amended to cover employees of street, suburban or interurban electric railways, or local trolley or motorbus carriers, if the rates and services of these railways or carriers are subject to regulation by a State or local agency, regardless of whether or not such railways or carriers are public or private or operated for profit or not for profit. These enterprises which are not proprietary that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises

from the FLSA under *National League* (Opinion WH:492, Feb. 1, 1979, reprinted in *Wage & Hour Manual* (BNA) 91:1137-38) because it was owned by the county government, was operated by a board of commissioners appointed by the Police Jury, was established by an act of the state legislature, was considered a political subdivision of state government, and had the power to issue bonds and purchase land. These same factors apply to SAM-TA, which was established by an act of the Texas legislature and is a political subdivision of the state, art. 1118x § 6(a); is operated by a board of trustees appointed by elected officials of cities in its service area and commissioners of Bexar County, *id.* § 6B; and can purchase land and issue bonds, *id.* §§ 6(d) & 7.

will result in the failure to implement one of the basic purposes of the act, the elimination of conditions which "constitute an unfair method of competition in commerce."

S. Rep. No. 1487, 89th Cong., 2d Sess. 8, reprinted in 1966 U.S. Code Cong. & Ad. News 3002, 3010. Interestingly, in its brief on the merits in *National League*, the Government argued that state activities besides schools and hospitals compete with the private sector and pointed to "trash collection agencies," "recreation facilities, libraries, and the like . . .," *id.* at 20, and in its brief in *Maryland v. Wirtz*, (pp. 13-14), the Government cited the very same House Report it now cites (No. 1366) in support of its argument that public hospitals and schools were properly brought under the FLSA to eliminate unfair competition.

In actuality, there is no competition in the transit field. Unlike hospitals, garbage collection companies and recreational facilities, mass transit does not and cannot operate profitably.

5. The Government (brief at p. 48 n.37) attempts to distinguish transit from the *National League* activities on the ground that transit receives user fees. The Government even maintains that sanitation, education and parks do not receive such fees. The Government is wrong in its analysis. User charges as a percent of total costs in 1980-81 in the nation's 46 largest cities, were 43% for sewage, 40% for hospitals, 19% for institutions of higher education, and 16% for parks and recreation. Bureau of Census, U.S. Dep't of Commerce, *City Government Finances in 1980-81* tab. 8, at 98 (1981).³³ As noted earlier, SAMTA's fare box receipts represent less than 25% of operating costs. Furthermore, public facilities such as golf courses and garbage collection routinely charge user fees. Federal law even requires that federally funded sewage treatment plants adopt user charges that permit break-even financing. 33 U.S.C. § 1284(b)(1)(A) (Supp. V 1981).

³³ These percentages were calculated by dividing total expenditures for each service into total revenues for each service.

D. FEDERAL FUNDING OF TRANSIT IS IRRELEVANT.

The Government and Garcia both challenge *National League* immunity on the ground that UMTA funds allegedly hastened the public takeover of transit systems. This contention draws absolutely no support from *National League* or *LIRR*, it is invalidated by this Court's decision in *Jackson Transit Authority v. Amalgamated Transit Union Local 1285*, 457 U.S. 15 (1982), and it constitutes a convoluted attempt to apply Spending Power arguments in a Commerce Clause case.

Initially, it should be noted that neither the City of San Antonio nor SAMTA received one cent of federal assistance in acquiring the local transit operations in San Antonio. The City bought the San Antonio Transit Company's assets in 1959, five years *before* federal grants were available. SAMTA acquired the equipment and facilities of the city-owned system in 1978 through the issuance of bonds payable only out of local revenues — not out of federally provided funds.

More importantly, this Court's decision in *Jackson Transit* forecloses appellants' federal funding argument. In that case, a unanimous Court rejected a transit union's claim that by providing UMTA funds Congress intended to regulate transit labor relations. The Court specifically held that "Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers." *Id.* at 27. Certainly receipt of those very same funds cannot abrogate the Tenth Amendment rights of those same governmental entities, particularly since nothing in UMTA requires compliance with the FLSA.

Section 13(c) of UMTA (49 U.S.C. § 1609(c) (1976)), relied on by the Government (brief p. 45) and Garcia (brief p. 17), underscores the irrelevancy of federal aid to transit. Section 13(c) requires that as a condition of federal assistance, "fair and equitable arrangements [be] made, as determined by the Secretary of Labor, to protect the interests of employees affected

by such assistance" and that the terms and conditions of the assurances be specified in the contract granting UMTA assistance.³⁴ Nothing in the 13(c) assurances between SAMTA and the Government (R. 514-527) obligates SAMTA to pay FLSA overtime to its workers. Rather, they require only that the rights, privileges and benefits of SAMTA's employees under the existing working conditions and practices and policies be preserved and continued. R. 515. They also state (*id.*) that "[u]nless otherwise provided, nothing in these arrangements shall be deemed to restrict any rights the Recipient may otherwise have to direct the working forces and manage its business as it deems best, in accordance with the working conditions." Section 9(d) of UMTA (49 U.S.C. § 1608(d)(Supp. V 1981) prohibits use of UMTA provisions to "regulate in any manner the mode of operation of any mass transportation system" receiving a section 1602 grant except to require compliance with "undertakings furnished . . . in connection with the application for the grant." Since nothing in UMTA or the 13(c) assurances requires FLSA overtime, and they in fact bar other federal interference in SAMTA's operations, appellants cannot rely upon UMTA to compel compliance with the FLSA. See *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously").³⁵

In arguing that UMTA grants affect transit's *National League* immunity, the Government is really making a Spend-

³⁴ Federal funding laws in areas exempted by the Court contain similar provisions conditioning assistance on "fair and equitable arrangements . . . to protect the interests of employees": Juvenile Justice & Delinquency Prevention Act of 1974, 42 U.S.C. § 5633(a)(18) (Supp. V 1981); Public Health Service Act (as amended in 1979), 42 U.S.C. § 300t-12(c)(1)(Supp. V 1981); Developmentally Disabled Assistance & Bill of Rights Act, 42 U.S.C. § 6063(b)(7)(B) (Supp. V 1981).

³⁵ Whether UMTA could have constitutionally required FLSA coverage is not an issue in this case. The point is that neither UMTA nor SAMTA's 13(c) assurances undertook to require compliance with the FLSA.

ing Power argument in a Commerce Clause case. This difference was explicitly recognized in *National League*. 426 U.S. at 852 n.17. The Court obviously did not consider federal funding relevant since the dissent pointed out that during fiscal 1977 the President's proposed budget recommended \$60.5 billion in assistance to the States, including \$716 million for law enforcement assistance. *Id.* at 878.

The irrelevancy of federal aid to transit is also evident from a comparison of the substantial federal assistance to other exempt *National League* activities. Although the Government (brief pp. 34-35) has focused only on education and police protection in analyzing the role of federal aid to the States, it is undisputed that the federal government has underwritten other *National League* activities as much if not more than transit.³⁶ For example, between 1973 and 1981, \$33.3 billion was appropriated for wastewater treatment plant construction. *Municipal Wastewater Treatment Construction Grants Program: Hearings on S. 975 & S. 1274 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment & Public Works*, 97th Cong., 1st Sess. 7, 16 (1981). This is almost double the \$18 billion in federal aid to transit which Garcia (brief p. 20) claims has been made in the twenty years since UMTA was passed. Furthermore, the federal government pays up to 85% of capital costs for sewage treatment plants, many of which probably would not have been built without federal funds. 33 U.S.C. § 1282(a) (Supp. V 1981). In 1982 alone, the federal government contributed \$54.6 billion (40.3%) of total hospital expenditures in the United States. Gibson, *National Health Expenditures 1982*, 5 Health

³⁶ The Government (brief pp. 7, 32) and Garcia (brief p. 3) both place great reliance on the testimony of the general manager of SAMTA's predecessor when he appeared before Congress and requested more federal funding of transit. Similar statements were made at congressional hearings by state and local officials about sewage treatment. *E.g.*, *Federal Pollution Control Act Amendments of 1977: Hearings Before the Subcomm. on Environmental Pollution of the Comm. on Environment & Pub. Works*, 95th Cong., 1st Sess. 124-30 (1977). The archives are undoubtedly filled with similar pleas for federal aid for virtually any state activity Congress has chosen to fund.

Care Financing Rev. 1, 9 (1983). State and local governments contributed only 12.8% of the total. *Id.* at 9. In 1982, federal aid to transit comprised only 4% of the \$88.2 billion grants-in-aid given to state and local governments. Office of Mgmt. & Budget, Exec. Office of the President, *Special Analyses, Budget of the United States Government Fiscal Year 1984* tab. H-11, at pp. H-29, H-34 (1983). During the same period, 4% of federal grants were for sewage treatment plant construction, *id.* at H-28, 8% were for education, *id.* at H-30, and 20% were for health, *id.* at H-31.³⁷

Even if federal funds had been used in the acquisition of the transit system in San Antonio, SAMTA's entitlement to Tenth Amendment protection would not be affected. Local government's use of federal funds to acquire transit operations as a necessary step to ensure continuation of an essential local service is not materially different from federal subsidization of other local government activities which are exempt under *National League* and which would be curtailed or eliminated without federal aid. An activity specifically exempted in *National League*, which was essentially created as a result of federal funding, is solid waste management (sanitation). According to Office of Solid Waste Mgmt. Programs, EPA, *State Activities in Solid Waste Management, 1974* at iii (1975),

³⁷ During fiscal 1980 (the last year for which such data could be found), of the more than \$445 million in federal grants made to local governments and private entities and individuals in Bexar County, approximately \$6.4 million were construction grants for wastewater treatment works, \$44.6 million were for education, \$96.8 million were for health and human services, \$9.5 million were UMTA grants, and \$15.8 million were for revenue sharing. Community Serv. Admin., *Geographic Distribution of Federal Funds in Texas* 17-20 (1980). In fiscal 1982, federal aid to Texas and its political subdivisions was \$3.73 billion. Div. of Gov't Accounts & Reports, Fiscal Service—Bureau of Gov't Fin. Operations, Dep't of the Treasury, *Federal Aid to States Fiscal Year 1982* at 1 (1983). This sum included approximately \$190 million for elementary and secondary education, *id.* at 8; \$173 million for construction of wastewater treatment works, *id.* at 10; \$682 million for medical assistance, *id.* at 11; \$8 million for law enforcement assistance, *id.* at 17; \$78 million for UMTA assistance, *id.* at 21; and \$233 million in general revenue sharing, *id.* at 21.

"[m]ost of the State programs in solid waste management originated only within the past decade, under the stimuli of Federal planning grants and technical assistance authorized by the Solid Waste Disposal Act of 1965." See also discussion, *supra*, regarding the role of federal funds in the development of hospitals.

II. TRANSIT IS ALSO EXEMPT UNDER *NATIONAL LEAGUE* BECAUSE IT IS AN INTEGRAL COMPONENT OF THE TRADITIONAL STATE ACTIVITY OF PROVIDING AND MAINTAINING STREETS AND HIGHWAYS FOR PUBLIC TRANSPORTATION

This Court's holding in *National League* granted FLSA immunity to "integral operations in *areas* of traditional governmental functions." 426 U.S. at 852 (emphasis added). In view of the language used by the Court in setting the parameters of its decision, it would appear that transit is immune from the FLSA under the Tenth Amendment if it is integral to a traditional state function. As shown below, transit is an essential component of the traditional state activity of providing and maintaining streets and highways for public transportation.

It is undisputed even under an historical standard that road building and maintenance for public transportation is a traditional activity of the States. As this Court noted in *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1938):

Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. . . . *Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration.*

Id. at 187 (emphasis added).³⁸ See also *Molina-Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841, 845 (1st Cir.

³⁸ Since there is no history of the States' building, owning and maintaining railroad tracks and rights-of-way, railroads cannot be properly classified as an integral component of the street and highway transportation system.

1982) ("governments have built and maintained roads from time immemorial"); *Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment.").

Over the years, the States' role as road builder and owner has evolved to meet the changing needs of the populace, and as a consequence the States have adopted comprehensive transportation plans that encompass not only road building and maintenance, but mass transit as well. For example, article 6663c(1)(a)(2), Tex. Rev. Civ. Stat. Ann. (Vernon 1977) decrees that "[p]ublic transportation is an essential component of the State's transportation system" In 1975, article 6663b merged the Texas Mass Transportation Commission into the State Department of Highways and Public Transportation. See also article 1118x, § 1(c) ("concentration of motor vehicles places an undue burden on existing streets, freeways and other traffic ways, resulting in serious vehicular traffic congestion"). Senator Harrison A. Williams, in introducing a bill to amend UMTA in 1969, eloquently underscored the role of transit as a component part of road building: "If it is a public responsibility to build highways for those who can afford a car, then surely we have even a greater obligation to make sure that public transportation is available to those without cars." 115 Cong. Rec. 3433 (1969). See also *Molina-Estrada*, *supra*, in which the First Circuit lumped all of the highway department's activities together—including road building and repairing, operating toll roads and parking lots, and building a transit system—in concluding "that the Authority is responsible for 'traditional' or 'integral' governmental activities." 680 F.2d at 845. These authorities demonstrate that the district court was eminently correct in concluding that "[m]ass transit is an integral component of a state's transportation system." Gov't J.S. 5a.³⁹

³⁹ Also instructive are the many cases that have found other nonrailroad instrumentalities of transportation to be essential functions. *E.g.*, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723 (1961) (parking building

III. THE FLSA CANNOT BE APPLIED TO ANY STATE OR LOCAL GOVERNMENT EMPLOYEES ABSENT A CONSTITUTIONALLY VALID AMENDMENT⁴⁰

A. If this Court allows application of the FLSA amendments only to public employees not excluded by *National League*, it will be engaging in judicial reformulation of the FLSA to add words of limitation (codifying the Court's "traditional governmental function" holding) where none presently exist. Although the FLSA has a severability clause (29 U.S.C. § 219 (1976)), the decisions of this Court show that such a clause does not permit a court to add words to a statute in order to make it constitutional.

operated by state-created parking authority "was dedicated to 'public uses' in performance of the Authority's 'essential governmental functions'"); *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1038 (6th Cir. 1979) (municipal airport); *United States v. State Road Dep't of Florida*, 255 F.2d 516, 518 (5th Cir. 1958) ("it must be conceded that the building and maintenance of a system of state roads is essentially a governmental function. It being further conceded that this ferry is an integral part of the state road system . . ."); *Fowler v. California Toll-Bridge Auth.*, 128 F.2d 549, 551 (9th Cir. 1942) (Toll Bridge Authority "is representing and assisting the State in the performance of a traditional governmental function, that of building, operating and maintaining bridges and highway crossings as a part of the government system of state highways"); *People ex rel. Gutknecht v. Chicago Regional Port Dist.*, 123 N.E.2d 92, 99 (Ill. 1954) ("There is in principle no essential difference, so far as the public interest and the public safety are concerned, between the operation of a public airport and that of a highway, subway, wharf, public park, and the like.")

⁴⁰ This question was pled and briefed in the proceeding below, but the district court did not pass on its merits. The Court may consider the issue since "an appeal under 28 U.S.C. § 1252 . . . brings the 'whole case' before the Court." *Fusari v. Steinberg*, 419 U.S. 379, 387 n.13 (1975); accord, *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977). SAMTA and APTA listed this as one of the questions presented in their motions to affirm, and appellants therefore should have presented any arguments they wish to bring before the Court on this point in their main briefs. See R. Stern & E. Gressman, *Supreme Court Practice* 704 (5th ed. 1978). Since they did not, they should be foreclosed from addressing it in their reply briefs. Alternatively, appellees should be given an opportunity to respond to the reply briefs on this point.

Hill v. Wallace, 259 U.S. 44 (1922) involved a severability clause virtually indistinguishable from the one in the FLSA. The Court held that the clause "did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain [since] [t]his is legislative work beyond the power and function of the court." *Id.* at 70. The Court relied on and quoted from *United States v. Reese*, 92 U.S. 214 (1876) in which Chief Justice Waite said:

"We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. *The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. . . .* To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty. . . ."

259 U.S. at 70-71 (emphasis added). The Court also stated:

To be sure in the cases cited there was no saving provision like § 11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. *But it does not give the court power to amend the act.*

Id. at 71 (emphasis added).

In order to bring virtually all states and local governments under the FLSA in 1974, Congress amended section 203(d) to include a "public agency" within the definition of "employer" and added section 203(x) to define public agency as meaning, among other things, "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State." In order to make these definitions constitutionally valid under *National League*, a court would have to reframe the definition to add words of limitation such as, "to the extent they are not performing integral operations in areas of traditional governmental functions." Under

the rationale of *Hill v. Wallace*, a court cannot do this notwithstanding the presence of a severability clause. This Court's recent ruling in *INS v. Chadha*, 103 S. Ct. 2764, 2774-76 (1983) does not affect this result since that case did not involve use of a severability clause to add rather than delete provisions.⁴¹

B. Application of the FLSA only to nontraditional functions is also constitutionally unsound for a second reason. Congress intended to extend FLSA coverage to virtually all public employees. However, the necessary result of *National League* is to remove the great majority of public employees from the FLSA. Thus the very limited application of the FLSA permitted by *National League* would create a program different from the one Congress believed it was adopting. See *Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (severability clause does not permit a court to apply educational reimbursement statute to nonsectarian schools since it could not be constitutionally applied to sectarian schools; "[t]he statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted"). The FLSA sets up no dichotomy between traditional and nontraditional governmental functions, and

⁴¹ The 1966 FLSA amendments apply only to public transit systems whose "rates and services are subject to regulation by a state or local agency" The plain meaning of this provision must be that only public systems that are regulated by some other state or local agency are covered. If public transit systems that regulated their own rates and services were included, the limitation in the 1966 amendments would have no meaning since all public systems would be covered. That SAMTA's interpretation is correct is indicated by the fact that in 1971, a bill was introduced to amend the FLSA to "apply to public transit systems whether or not their rates and services are subject to regulation by a state or local agency." *Hearings on H.R. 7130 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 206 (1971) (statement of C. Cochran, for Am. Transit Ass'n). Since SAMTA regulates its own services, see article 1118x §§ 6, 12, 13, and therefore is not embraced by the 1966 amendments, the only way FLSA coverage can be extended to its operations is through the 1974 amendments' inclusion of "public agenc[ies]."

therefore to reframe the statute to incorporate such a distinction would create a program different from the one Congress actually adopted. *See also Meek v. Pittenger*, 421 U.S. 349, 371 n.21 (1975).

Chadha does not require a different result. Congress relied on this Court's decision in *Maryland v. Wirtz* when it extended the FLSA to the entire public sector, and it presumably did not intend to enact a program covering only a small number of public employees. *See* H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 6-7, *reprinted in* 1974 U.S. Code Cong. & Ad. News 2811, 2816-17; *see also* 118 Cong. Rec. 24,240, 24,749 (1972).

CONCLUSION

SAMTA respectfully submits that the judgment of the district court is manifestly correct and should be affirmed.

Respectfully submitted,

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Dated: February 3, 1984

APPENDIX

APPENDIX

1. Article 1118x, Texas Revised Civil Statutes Annotated (Vernon Supp. 1982-83) Provides In Part:

Section 1. The legislature finds that:

(a) A dominant part of the state's population is located in its rapidly expanding metropolitan areas which generally cross the boundary lines of local jurisdictions and often extend into two or more counties;

(b) The concentration of population in such areas is accompanied by a corresponding concentration of motor vehicles which are generally powered by internal combustion engines that emit pollutants into the air, which emissions result in increasing dangers to the public health and welfare, including damage to and deterioration of property as well as harm to persons, and hazards to air and ground transportation;

(c) Such concentration of motor vehicles places an undue burden on existing streets, freeways and other traffic ways, resulting in serious vehicular traffic congestion that retards mobility of persons and property and adversely affects the health and welfare of the citizens and the economic life of the areas;

(d) The proliferation of the use of motor vehicles for passenger transportation in such areas is caused in substantial part by the absence or inefficiency and high cost of mass transit services available to the citizens of such areas, and it is in the public interest to encourage and provide for efficient and economical local mass rapid transit systems in such areas for the benefit and convenience of the people and for the purpose of improving the quality of the ambient air therein and reducing vehicular traffic congestion; and

(e) The inalienable right of all natural persons to use the air for natural purposes does not vest in any person the right to pollute the air by artificial means, but such artificial use is subject to regulation and control by the state.

* * * * *

Sec. 3. (a) The governing body of a principal city in a metropolitan area may, on its own motion, shall, as provided in Subsection (b) of this section, and shall, upon

being presented with a petition so requesting signed by not less than 5,000 qualified voters residing within such metropolitan area, institute proceedings to create a rapid transit authority in the manner prescribed in this section.

* * * * *

Sec. 5. (a) After the original board is organized, at such time as it deems implementation of the authority to be feasible, it shall call a confirmation and tax election in accordance with the provisions of this section.

* * * * *

Sec. 6. (a) The authority, when created and confirmed, shall constitute a public body corporate and politic, exercising public and essential governmental functions, having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Act, including, but not limited to, the following powers granted in this section.

* * * * *

(e) The authority shall have the power to acquire, construct, complete, develop, own, operate and maintain a system or systems within its boundaries, and both within and without the boundaries of incorporated cities, towns and villages and political subdivisions, and for such purposes shall have the right to use the streets, alleys, roads, highways and other public ways and to relocate, raise, reroute, change the grade of, and alter the construction of, any street, alley, highway, road, railroad, electric lines and facilities, telegraph and telephone properties and facilities, pipelines and facilities, conduits and facilities, and other properties, whether publicly or privately owned, as necessary or useful in the construction, reconstruction, repair, maintenance and operation of the system, or to cause each and all of said things to be done at the authority's sole expense. . . .

* * * * *

(g) The authority shall have the right of eminent domain . . .

* * * * *

(n) The authority shall by resolution make all rules and regulations governing the use, operation and maintenance of the system and shall determine all routings and change the same whenever it is deemed advisable by the authority.

* * * * *

(p) The acquisition of any land or interest therein pursuant to this Act, the planning, acquisition, establishment, development, construction, improvement, maintenance, equipment, operation, regulation, protection, and policing of the authority's system and facilities, and the exercise of any other powers herein granted an authority, are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity.

* * * * *

Sec. 6C. (a) The acquisition of any land or interest in land pursuant to this Act; the planning, acquisition, establishment, development, construction, improvement, maintenance, equipment, operation, regulation, protection, and policing of the authority's system and facilities; and the exercise of any other powers granted an authority, including without limitation the rights, powers, and authority relating to station or terminal complexes as provided in this section, are declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity for public use and public benefit.

* * * * *

Sec. 7. (a) The authority shall have no power to assess, levy or collect any ad valorem taxes on property, nor to issue any bonds or notes secured by ad valorem tax revenues. The authority, however, shall have the full power to issue bonds and notes, from time to time and in such amounts as it shall consider necessary or appropriate, for the acquisition, purchase, construction, reconstruction, repair, equipping, improvement or extension of such rapid transit system or systems and all properties thereof whether real, personal or mixed. . . .

* * * * *

Sec. 8. (a) Subject to approval at an election, the board of an authority shall be authorized to levy and cause to be collected motor vehicle emission taxes as herein provided. . . .

* * * * *

Sec. 11A. (a) In addition to or in lieu of the motor vehicle emission taxes provided for in this Act, the board of an authority may levy and collect any kind of tax, other than an ad valorem tax on property, which is not prohibited by the Texas Constitution.

* * * * *

Sec. 11B. (A) Subject to approval at a tax election in accordance with this Act, the board of an authority shall be authorized to levy, collect and impose a local sales and use tax for the benefit of the authority, the sales tax portion of which shall not exceed one percent on receipts from the sale of all taxable items within the authority area which are subject to taxation under the provisions of the Limited Sales, Excise and Use Tax Act, as enacted and as heretofore or hereafter amended. . . .

* * * * *

Sec. 12. The responsibility for the management, operation and control of the properties belonging to an authority shall be vested in its board. The board may:

(a) employ all persons, firms, partnerships or corporations deemed necessary by the board for the conduct of the affairs of the authority, including, but not limited to, a general manager, bookkeepers, auditors, engineers, attorneys, financial advisers and operating or management companies, and prescribe the duties, tenure and compensation of each. . . .

* * * * *

Sec. 13. The board may adopt and enforce reasonable rules and regulations:

(a) to secure and maintain safety and efficiency in the operation and maintenance of its facilities;

(b) governing the use of the authority's facilities and services by the public and the payment of fares, tolls and charges;

(c) regulating privileges on any land, easement, right-of-way, rolling stock or other property owned or controlled by the authority; and

(d) regulating the collection and payment of emission taxes levied by the board.

* * * * *

Sec. 13A. Any authority established hereunder shall be within the definition of "unit of government" as defined by the Texas Tort Claims Act, as amended (Article 6252-19, Vernon's Texas Civil Statutes), and all operations of an authority are deemed to be essential governmental functions and not proprietary functions for all purposes, including the application of the Texas Tort Claims Act.

2. Article 6663b, Texas Revised Civil Statutes Annotated (Vernon 1977) Provides In Pertinent Part:

Section 1. (a) The State Department of Highways and Public Transportation:

(1) may purchase, construct, lease, and contract for public transportation systems in the state;

(2) shall encourage, foster, and assist in the development of public and mass transportation, both intracity and intercity, in this state;

(3) shall encourage the establishment of rapid transit and other transportation media;

(4) shall develop and maintain a comprehensive master plan for public and mass transportation development in this state;

(5) shall assist any political subdivision of the state in procuring aid offered by the federal government for the purpose of establishing or maintaining public and mass transportation systems;

* * * * *

Sec. 2. On the effective date of this Act, all programs, contracts, assets, and personnel of the Texas Mass Transportation Commission are transferred to the State Department of Highways and Public Transportation. The comptroller of public accounts and the State Board of Control shall assist in the orderly implementation of this transfer.

3. Article 6663c, Texas Revised Civil Statutes Annotated (Vernon 1977) Provides In Pertinent Part:

Section 1. (a) The legislature finds that:

(1) transportation is the lifeblood of an urbanized society, and the health and welfare of that society depend on the provision of efficient, economical, and convenient transportation within and between urban areas;

(2) public transportation is an essential component of the state's transportation system;

* * * * *

(b) The purposes of this Act are to provide:

(1) improved public transportation for the state through local governments acting as agents and instrumentalities of the state;

(2) state assistance to local governments and their instrumentalities in financing public transportation systems to be operated by local governments as determined by local needs; and

(3) coordinated direction by a single state agency of both highway development and public transportation improvement.

4. The Fair Labor Standards Act Of 1938, 29 U.S.C. § 201 et seq. (1976) Provides In Part:

29 U.S.C. § 203:

As used in this chapter—

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States

(including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

* * * * *

29 U.S.C. § 219:

If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

5. The Urban Mass Transportation Act Of 1964, 49 U.S.C. § 1601, *et seq.* (1976 & Supp. V 1981) Provides In Part:

49 U.S.C. § 1601b:

The Congress finds that—

(1) over 70 per centum of the Nation's population lives in urban areas;

(2) transportation is the lifeblood of an urbanized society and the health and welfare of that society depends upon the provision of efficient economical and convenient transportation within and between its urban areas;

(3) for many years the mass transportation industry satisfied the transportation needs of the urban areas of the country capably and profitably;

(4) in recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service;

(5) the termination of such service or the continued increase in its cost to the user is undesirable, and may have a particularly serious adverse effect upon the welfare of a substantial number of lower income persons;

(6) some urban areas are now engaged in developing preliminary plans for, or are actually carrying out, comprehensive projects to revitalize their mass transportation operations; and

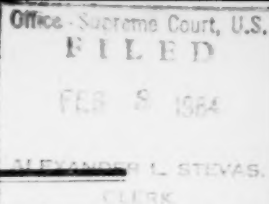
(7) immediate substantial Federal assistance is needed to enable many mass transportation systems to continue to provide vital service.

* * * * *

49 U.S.C. § 1608(d):

None of the provisions of this chapter shall be construed to authorize the Secretary to regulate in any manner the mode of operation of any mass transportation system with respect to which a grant is made under section 1602 of this title or, after such grant is made, to regulate the rates, fares, tolls, rentals, or other charges fixed or prescribed for such system by any local public or private transit agency; but nothing in this subsection shall prevent the Secretary from taking such actions as may be necessary to require compliance by the agency or agencies involved with any undertakings furnished by such agency or agencies in connection with the application for the grant.

Nos. 82-1951 and 82-1913



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
and AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees

JOE G. GARCIA,

v.

Appellant

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
and AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees

On Appeals from the United States District Court
for the Western District of Texas

**BRIEF FOR THE AMERICAN PUBLIC
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QUESTIONS PRESENTED

1. *National League of Cities v. Usery*, 426 U.S. 833 (1976), held that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act interfere with an essential attribute of state sovereignty and therefore constitutionally cannot be applied to integral activities in areas of traditional governmental functions. Are publicly owned local mass transit services integral activities in areas of traditional governmental functions, thus precluding the application of these federal statutory provisions to them?

2. Did *National League of Cities* find unconstitutional so much of Congress' intended coverage of state and local governmental functions by the minimum wage and overtime compensation provisions of the Fair Labor Standards Act that it is unwarranted to apply these requirements to publicly owned local mass transit systems without new congressional enactment?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1951

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant
v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
and AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees

No. 82-1913

JOE G. GARCIA,
Appellant
v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
and AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees

On Appeals from the United States District Court
for the Western District of Texas

**BRIEF FOR THE AMERICAN PUBLIC
TRANSIT ASSOCIATION**

STATEMENT OF THE CASE

The sole issue in this case is whether local publicly owned mass transit services are integral activities in areas of traditional state and local governmental func-

tions. For this Court has already decided that the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981) ("FLSA"), fixing minimum wages and overtime compensation interfere with an essential attribute of state sovereignty and therefore may not be applied to state and local government employees performing such functions. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

The relevant facts are:

1. The City of San Antonio established a publicly owned local mass transit system in 1959.¹ In 1978, appellee, the publicly owned San Antonio Metropolitan Transit Authority ("SAMTA") acquired the assets of the transit system from the city and now provides local public transit services to the city and most of Bexar County, Texas. SAMTA, a political subdivision of the State of Texas, according to state law, is "exercising public and essential governmental functions." Tex. Rev. Civ. Stat. Ann. art. 1118x § 6(a) (Vernon Supp. 1982). SAMTA provides bus service to the entire community at fares which cover only 25 percent of operating expenses. In addition, bus service is provided at reduced fares for school children, the elderly and the handicapped, and some downtown service has been provided free of charge. A local sales tax provides substantial revenues to meet operating expenses. Acquisition of the system by the city in 1959 and by SAMTA in 1978 was financed entirely by public bonds; no federal funds were used.

2. The publicly owned state and local transit agencies that will be affected by this decision are maintained by substantial state and local taxes to provide essential public services and an infrastructure that facilitates public

¹ Facts concerning local transit in San Antonio are drawn from the Affidavit of Wayne M. Cooke, General Manager, San Antonio Metropolitan Transit Authority, R. 196-203.

movement throughout the community.² They are not operated for profit. Employees of these systems, nevertheless, have achieved—primarily through collective bargaining—almost the highest wages of any state and local government employees.³ The average wage of employees of these agencies is \$9.01 per hour.⁴

3. This case arises out of a dispute between the States and the federal government that has ensued since 1966, when Congress, acting pursuant to its Commerce Clause powers, amended the Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938), attempting for the first time to include a limited number of state activities within its coverage.⁵ Although the FLSA was enacted in 1938, it was not until 1961 that Congress extended the minimum wage requirements to *private* transit employees. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72. In 1966, Congress for the first time extended some FLSA coverage to public as well as private providers of schools, institutions, hospitals, and some employees of local mass transit.⁶ The practical implications for local publicly owned transit

² See *infra* pp. 16-20.

³ U.S. Department of Commerce, *Public Employment in 1982*, Table 4 at 12 (1983).

⁴ U.S. Department of Labor, *Union Wages and Benefits: Local Transit Operating Employees*, Table 2 at 4 (1981). See also Amalgamated Transit Union, Research Department Bulletin 5 (Nov. 1983).

⁵ The only provisions of the FLSA at issue in this case are the minimum wage and overtime compensation requirements that were addressed in *National League of Cities v. Usery*, 426 U.S. 833 (1976); contrary to federal appellant's implications, Brief for Federal Appellant ("U.S. Br.") 2 n.2, 3 n.5, 44, the child labor provisions are not at issue.

⁶ Local mass transit was described as "street, suburban or inter-urban electric railway, or local trolley or motorbus carrier[s]" subject to state or local regulation, Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 830, 831. Street

were limited because the 1966 amendments specifically exempted most transit employees—operators, drivers and conductors—from the overtime compensation provisions of the Act, Pub. L. No. 89-601, § 206, 80 Stat. 830, 836. In 1974, after this Court's decision in *Maryland v. Wirtz*, 392 U.S. 183 (1968), had upheld the FLSA's coverage of some state activities, Congress, which reasonably would have assumed that it had unlimited power under the Commerce Clause to apply the FLSA to all state employees, further amended the statute to cover almost all employees of state and local governments in areas where private employers were already covered. See *National League of Cities*, 426 U.S. at 838-39. Only at this time did Congress seek to phase in over a two-year period the provision in the statute most troubling to public transit systems, the overtime requirements for private or public transit operators. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 21(b), 88 Stat. 55, 68.

State and local governments successfully challenged the 1974 amendments in *National League of Cities*. This Court held that the FLSA wage and hour provisions cannot be applied constitutionally to most activities of state and local governments. Expressly overruling *Wirtz*, the Court cited several examples of the numerous state activities affected by its decision, but did not specifically include or exclude publicly owned local mass transit services.

4. Federal appellant first indicated its intent to apply the FLSA to publicly owned local mass transit services over three years after *National League of Cities* was decided, in a letter to a transit union dated September 17,

electric railways are a form of local transit as are trolleys and buses. Historically they have not been part of the national main-line railroad system, unlike commuter railroads, see American Public Transit Association, *Transit Fact Book* 72 (1981) ("*Transit Fact Book*").

1979.⁷ SAMTA learned of the letter and filed suit on November 21, 1979 seeking a declaratory judgment that the proposed application of the FLSA was unconstitutional.⁸ On December 21, 1979, the Department of Labor ("DOL") formally amended its FLSA regulations—without any public notice or comment—to assert that local publicly owned mass transit agencies do not perform integral operations in areas of traditional governmental functions and therefore are subject to the FLSA. 44 Fed. Reg. 75,630 (1979); 29 C.F.R. § 775.3(b) (1983).⁹

⁷ Letter from the Deputy Administrator of the United States Department of Labor to the Amalgamated Transit Union (September 17, 1979), R. 163-66.

⁸ While this is the only case involving this issue in which a declaratory judgment against the federal government was sought, the issue has been raised in other federal appellate courts. Compare, e.g., *Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841 (1st Cir. 1982) (concluding that the FLSA may not be applied to a state highway and transit authority) with *Alewine v. City Council of Augusta*, 699 F.2d 1060 (11th Cir. 1983), petitions for cert. filed, 51 U.S.L.W. 3884 (U.S. June 3, 1983) (No. 82-1974), 52 U.S.L.W. 3141 (U.S. Aug. 17, 1983) (No. 83-257), and *Kramer v. New Castle Area Transit Auth.*, 677 F.2d 308 (3d Cir. 1982), cert. denied, 103 S. Ct. 786 (1983) (concluding that the FLSA may be applied to local publicly owned mass transit systems). See also *Dove v. Chattanooga Area Regional Transp. Auth.*, 701 F.2d 50 (6th Cir. 1983) (reversing grant of summary judgment for transit agency and remanding for further proceedings); *Scholz v. City of LaCrosse*, No. 82-2890 (7th Cir. April 11, 1983) (order granting stay of proceedings pending this Court's ruling in these consolidated cases).

⁹ DOL listed along with publicly owned local mass transit the following state owned functions to which it believes the FLSA applies: off-track betting corporations, generation and distribution of electric power, provision of residential and commercial telephone and telegraphic communication, production and sale of organic fertilizer as a by-product of sewage processing, production, cultivation, growing or harvesting of agricultural commodities for sale to consumers, and repair and maintenance of boats and marine engines for the general public. 29 C.F.R. § 775.3(b) (1983). The regulations also state that the FLSA should *not* be applied to public libraries and museums. 29 C.F.R. § 775.4(b) (1983).

The American Public Transit Association ("APTA"), the members of which include most publicly owned local mass transit systems, intervened. Federal appellant also counterclaimed on behalf of SAMTA's employees for back pay¹⁰ and injunctive relief. An employee, Joe G. Garcia, intervened.

The district court granted SAMTA's and APTA's motions for summary judgment on November 17, 1981, ruling that local public mass transit systems (including SAMTA) are "integral operations in areas of traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976)." Appendix to Jurisdictional Statement for Federal Appellant ("U.S.J.S.") 23a. Appellants here appealed directly to this Court pursuant to 28 U.S.C. § 1252 (1976). The Court vacated the judgment and remanded the case "for further consideration in light of [the later-decided] *Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (1982) [("*LIRR*")]."
Donovan v. San Antonio Metropolitan Transit Authority, 457 U.S. 1102 (1982).

5. After further briefing and oral argument, the district court found that its previous conclusion that "operation of a public transit system is a governmental function entitled to Tenth Amendment immunity," was fully consistent with this Court's decision in *LIRR* and reentered judgment for SAMTA and APTA. U.S.J.S. 2a.¹¹

6. Appellants again appealed to this Court pursuant to 28 U.S.C. § 1252 (1976).

¹⁰ The FLSA authorizes the Secretary of Labor to seek back pay for employees and liquidated damages in an equal amount for up to three years if an employer did not compensate employees in the manner established by the FLSA. 29 U.S.C. § 216(c) (1976 & Supp. V 1981).

¹¹ The court's order of February 14, 1983 was withdrawn and reentered effective on that date on February 18, 1983 to correct typographical errors.

SUMMARY OF ARGUMENT

National League of Cities held that the FLSA minimum wage and overtime compensation provisions—the specific provisions at issue here—may not be applied consistently with the Tenth Amendment to “integral portion[s] of those governmental services which the States and their political subdivisions have traditionally afforded their citizens,” 426 U.S. at 855. This Court found that these wage and hour determinations are “‘functions essential to [the States’] separate and independent existence’ . . . so that Congress may not abrogate the States’ otherwise plenary authority to make them.” *Id.* at 845-46. See also *EEOC v. Wyoming*, 103 S. Ct. 1054, 1061 n.11 (1983) (reconfirming holding of *National League of Cities* that “[o]ne undoubted attribute of state sovereignty is the States’ power to determine [wages, hours and overtime compensation for employees carrying] out governmental functions”).

In subsequent decisions, this Court has addressed Tenth Amendment challenges to Congress’ exercise of Commerce Clause power in statutory contexts other than the FLSA. In each case it distinguished the federal statutory provisions at issue in *National League of Cities*, consistently reaffirming that the FLSA wage and overtime provisions cannot constitutionally be applied to integral operations in areas of traditional functions of state and local government. *EEOC*, 103 S. Ct. at 1060; *FERC v. Mississippi*, 456 U.S. 742, 758-59 (1982); *LIRR*, 455 U.S. at 685; *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 287-88 (1981).

I. The only remaining issue in this case not expressly resolved by *National League of Cities* is whether local publicly owned mass transit services are “integral operations in areas of traditional governmental functions.” 426 U.S. at 852.

Among these “important governmental activities,” *id.* at 847, specifically identified in *National League of Cities*, are fire and police protection, sanitation, parks and recre-

ation, public health, schools, and hospitals, *id.* at 851, 855. Federal appellant has added museums and libraries. 44 Fed. Reg. 75,630 (1979); 29 C.F.R. § 775.4(b) (1983). The list, however, is "not an exhaustive catalogue," and there are in addition "numerous line and support activities" within the protected area. 426 U.S. at 851 n.16. The court below determined that local publicly owned mass transit, like the other functions enumerated by this Court, is a protected activity "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* at 851.

A. From the inception of the Republic, one of the basic purposes for which communities have organized themselves into governments has been to provide a local transportation infrastructure. See *Molina-Estrada*, 680 F.2d at 845-46. As transportation technology has evolved, and as urban areas have become more congested (thereby necessitating that people join together to share transportation), the means by which state and local governments have met this transportation responsibility also has changed. In addition to the management of streets and highways, states and their political subdivisions have become the predominant providers of local mass transit services. About 90 percent of local transit revenues, total transit miles, and passenger trips are attributable to publicly owned local mass transit systems. Affidavit of Stanley G. Feinsod, Executive Director, Policy and Programs, American Public Transit Association ("Feinsod Affidavit") ¶ 4, R. 177. Local public transit systems serve the transportation needs of the entire community, including low-income residents, who constitute 80 percent of mass transit riders.¹² Such riders depend on public transit for access to jobs and to public health, education and other vital governmental services. Even community

¹² This figure represents riders with an income of \$15,000 or less. Urban Mass Transportation Administration, U.S. Department of Transportation, *Moving People, An Introduction to Public Transportation* 35 (1981).

residents who are neither poor nor regular transit riders benefit from the reduced traffic congestion, increased safety, cleaner air, and more rational and efficient land use that public transit makes possible. To attain these community-wide benefits, local publicly owned mass transit is provided as a public service and not for pecuniary gain; state and local assistance contributes 40 percent of operating revenues nationwide. *Transit Fact Book* 45. Fares provide only about 40 percent of such revenues, *id.*, and are substantially reduced for the elderly and students. See *infra* text accompanying note 20.

States increasingly have provided public mass transit because it is a service that "their citizens require," *National League of Cities*, 426 U.S. at 847, not to compete with private providers, but rather to contribute to a balanced local transportation infrastructure that is responsive to changing urban needs and public welfare demands. The planning, construction and operation of public transit facilities and services—from subway lines to bus routes—is an integral part of the local planning process and the management of streets and highways, which the States overwhelmingly "have regarded as integral parts of their governmental activities." *Id.* at 854 n.18.

B. Appellants argue that, although local mass transit has become a pervasively public function, this has not been true for an adequate historical period to qualify as a "traditional governmental function." See U.S. Br. 11, 16-20, 24-25, Brief for Appellant Garcia ("G. Br.") 15-17. This Court, however, has rejected such a "static historical view of state functions generally immune from regulation." *LIRR*, 455 U.S. at 686. Local mass transit, moreover, began to evolve into a public function of state and local governments early in the century when several major cities adopted this means of supplementing their transportation infrastructure shortly after transit technology was developed and the problems of urbanization began to emerge. Later in the century, fueled by an

expansive federal highway program, many middle class riders turned to the automobile and life in the suburbs, thus radically altering the transportation requirements of urban communities and accelerating the shift toward public provision of local mass transit services to meet these changing needs.

II. Failing to distinguish this case from *National League of Cities*, appellants unsuccessfully attempt to create a novel issue by invoking the authority of federal statutes other than the FLSA.

A. Appellants cite a few federal labor laws in an attempt to show that failure to apply FLSA requirements to local public transit systems would result in an unconstitutional erosion in an area of traditional federal regulatory authority within the meaning of *LIRR*. That case, however, involved a distinct and unique federal statutory scheme comprehensively regulating the national railroad network, both private and public, for nearly a century. See *infra* p. 28. Local mass transit, in contrast, has always been the primary responsibility of state and local governments and thus subject to comprehensive state statutory regulation. Furthermore, the federal statutes cited by appellants are general labor laws that apply to almost all private activities, including the private counterparts of activities expressly immunized in *National League of Cities*. Appellants cite, for example, the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981) ("NLRA"), which applies to private schools, hospitals, and transit systems, but exempts public schools, hospitals, and transit systems.

B. Appellants next attempt to distinguish local public mass transit from the activities expressly protected by *National League of Cities* by claiming an extraordinary federal interest in this particular local public service by virtue of federal funding under the Urban Mass Transportation Act, 49 U.S.C. §§ 1601-1618 (1976 & Supp. V 1981) ("UMTA"). But this Court has unanimously held

that Congress did not intend through UMTA "to create a body of federal law applicable to labor relations between local governmental entities and transit workers." *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 27 (1982). And similar programs of "cooperative federalism" enabling states to provide important public services exist for most of the activities cited in *National League of Cities*. Because of its greater revenue raising ability, the federal government has become a primary source of funds for virtually all essential state activities, *e.g.*, health, schools, sanitation, and law enforcement. It would be a confusion of the respective functions of each level of government in our federal system to conclude that the reach of Commerce Clause power over the States is commensurate with the federal ability to raise and spend monies. In fact, appellants seem to be urging this Court to imply that Congress properly exercised such broad Commerce Clause power in a statute passed pursuant to Congress' Spending Clause power. Such an implication of congressional intent goes well beyond implying conditions in federal grants to states, something this Court expressly identified as a threat to the federal system in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).

III. In any event, since *National League of Cities* struck down most of the intended coverage of state and local governments by the FLSA wage and overtime compensation requirements, the statute may not now be read to allow coverage of a small class of public employees without subsequent amendment. See *Sloan v. Lemon*, 413 U.S. 825, 834 (1973).

ARGUMENT

I. *National League Of Cities* Determined That The Fair Labor Standards Act Minimum Wage And Overtime Compensation Provisions May Not Be Applied To Integral Activities In Areas Of Traditional State And Local Governmental Functions.

As its subsequent decisions have made increasingly clear, this Court in *National League of Cities* has conclusively determined all but possibly one of the requirements for invalidating application of the FLSA to local publicly owned mass transit.¹³ See *LIRR*, 455 U.S. at 684 n.9; *Hodel*, 452 U.S. at 287-88. In *Hodel*, this Court articulated the criteria that must be applied:

[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

452 U.S. at 287-88 (citations omitted; emphasis in original). The Court also noted:

¹³ *National League of Cities* was founded on an analysis of the limitations imposed by the Tenth Amendment and our system of federalism on the otherwise legitimate exercise of congressional Commerce Clause powers; therefore, federal appellant cannot sidestep the constitutional issue here merely by declaring that the UMTA and the FLSA reflect the congressional belief that local mass transit has an "interstate impact" and that "[b]ecause of the direct impact of transit service on interstate commerce the FLSA may constitutionally be applied to public transit employees." U.S. Br. 46-47.

Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission.

Id. at 288 n.29.

National League of Cities has already decided, first, that application of the FLSA to the States and their political subdivisions regulates the "States as States," 426 U.S. at 845. Second, it decided that the FLSA's regulation of minimum wage and overtime compensation for state and local employees addresses a matter that is an "undoubted attribute of state sovereignty." *Id.* Furthermore, as this Court recently confirmed in *LIRR*, *National League of Cities* has decided the fourth point, the balance between the federal and state interests, see 426 U.S. at 852-53; see also *id.* at 856 (Blackmun, J., concurring), and has determined that the nature of the federal interest advanced in the FLSA was not "so great as to 'justif[y] State submission.'" *LIRR*, 455 U.S. at 684 n.9 (quoting *Hodel*, 452 U.S. at 288 n.29).

Finally, the first aspect of the third requirement—whether the States' compliance with the federal law would "directly impair their ability 'to structure integral operations in areas of traditional governmental functions,'" *Hodel*, 452 U.S. at 288 (citation omitted; emphasis added)—is also resolved for this case by *National League of Cities*. There, this Court held that applying the very same FLSA provisions to integral operations in areas of traditional governmental functions would "impermissibly interfere" with an essential attribute of state sovereignty, leaving little of the "States' 'separate and independent existence,'" 426 U.S. at 851 (citation omitted; emphasis added).¹⁴ *National League of Cities*

¹⁴ Contrary to federal appellant's suggestion, U.S. Br. 43-45, when this Court in *National League of Cities* asked whether imposi-

has already established that federal displacement of the States' prerogative to establish wages and overtime compensation for employees engaged in areas of traditional functions would impair the States' "'ability to function effectively in a federal system,'" *id.* at 852 (citation omitted).

As this Court reaffirmed in *EEOC*, "*National League of Cities* held that 'there are attributes of sovereignty attaching to every state government which may not be impaired by Congress' and that '[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work and what compensation will be provided where these employees may be called upon to work overtime.' 426 U.S. at 845." 103 S. Ct. at 1061 n.11. Thus, *National League of Cities* has decided part of the final test, leaving unresolved only whether local publicly owned mass transit is an integral part of a traditional function of state and local government.¹⁵ The court below correctly answered in the affirmative.

tion of a federal regulation would endanger the States' "separate and independent existence" it called for an evaluation of the effect on state sovereignty of the FLSA's displacement of state policy choices regarding wages and hours. It did not call for consideration of whether the States' provision of certain services, *e.g.*, transit, parks, or hospitals, is essential to the States' "separate and independent existence," *id.* As the Court reaffirmed in *EEOC*, "application of the federal wage and hour statute to the States threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking." 103 S. Ct. at 1062 (citation omitted). It is this encroachment that threatens state sovereignty; *National League of Cities* does not require a showing that state sovereignty is threatened if a state does not provide, for example, public hospitals, parks, museums, libraries or transit.

¹⁵ This issue, in keeping with the explicit suggestion of the federal government in that case, was not addressed by the Court in *LIRR*. See *infra* note 38.

A. Publicly Owned Local Mass Transit Is An Integral Activity In An Area Of Traditional State And Local Governmental Functions.

As the district court concluded, the provision of publicly owned local mass transit services is as integral to the public responsibility of state and local government as are "fire prevention, police protection, sanitation, public health, and parks and recreation," *National League of Cities*, 426 U.S. at 851, and schools and hospitals, *id.* at 855, which, while "obviously not an exhaustive catalogue," *id.* at 851 n.16, this Court has held are "typical" examples of the "numerous line and support activities which are well within the area of traditional operations of state and local governments," *id.*¹⁶

A city's transportation infrastructure contains transportation routes which, like the veins and arteries of the human cardiovascular system, provide the paths for the lifeblood of its object, facilitating circulation and nourishing those areas the lines reach. If any are blocked, the area they serve—or sometimes even the entire object—

¹⁶ While distinctions can be drawn between publicly owned local transit and the activities enumerated in *National League of Cities*, and "[w]hile there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected [in *National League of Cities*], each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *National League of Cities*, 426 U.S. at 855 (footnote omitted). Lacking any constitutionally significant basis for distinguishing local publicly owned transit services from other essential public services expressly protected by *National League of Cities*, Appellant Garcia urges this Court to limit the reach of immunity from FLSA coverage to law enforcement officers, G. Br. 23, which presumably would eliminate Tenth Amendment immunity for most employees of schools, hospitals, parks, recreation and so forth. But this Court more thoughtfully has sought to isolate for exemption from the FLSA those areas of governmental services that are "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851.

deteriorates and dies. A local transportation network is thus essential to the life of any community, and the management of such a network is one of the sovereign purposes for which state and local governments exist.

These governments have regarded the use of publicly owned local mass transit as an integral and often essential means of performing this traditional governmental function.¹⁷ Buses and subways are necessary to transport middle and lower income people to work—people who cannot afford an automobile or city-center parking fees. Buses or subways are necessary to transport children to integrated schools across town or the single high school in a rural school district. Buses or subways are necessary to enable senior citizens at a reduced fare occasionally to go to a department store or downtown cafeteria. Buses or subways are necessary to bring people to work or shop in a redeveloped neighborhood so that businesses are willing to locate there and residents willing to buy and renovate homes. Even for persons who are not regular riders, public transit is necessary to relieve traffic congestion and foster safe streets and a more livable environment. The life of communities is, and always has been, entirely dependent on publicly provided means of movement between home, work and shops and, in urban areas in particular, this dependency has long meant providing local mass transit services as well as providing streets and roads. Public mass transit therefore is an integral part of a traditional—indeed critical—function of state and local government, which is at least as important to the health and survival of a community as are

¹⁷ Indeed, federal appellant acknowledges as much, U.S. Br. 29-30, by quoting the director of the Atlanta Region Metropolitan Planning Commission as stating that local government officials believe that in addition to highway programs their communities must have "a completely balanced transportation system" which includes public mass transit. *Cf. Molina-Estrada*, 680 F.2d at 845.

the functions expressly protected in *National League of Cities*.¹⁸

For this reason, public transit agencies are organizationally integrated or closely coordinated with other essential local governmental services such as street and traffic management, public works, land use planning and zoning—often under the umbrella of a common city department or regional authority. Feinsod Affidavit ¶ 11, R. 183-86. Decisions about where, how and when to condemn land to build a subway line or urban expressway, or where to place a bus stop, traffic light, pedestrian overpass or bus route, are the kinds of “core state functions” that local governments were created to perform. *EEOC*, 103 S. Ct. at 1060. Similarly, the budgeting of local transit agencies is an important part of a local government budget. See, e.g., *Subway-Surface Supervisors Association v. New York City Transit Authority*, 44 N.Y.2d 101, 111, 375 N.E.2d 384, 389, 404 N.Y.S.2d 323, 329 (N.Y. 1978) (transit system is performing a governmental function because of the “intertwinement” between its finances and the city’s). To serve people in a local community dependent on inexpensive transportation, general and special state and local tax revenues provide much of the financial support for local public mass transit.¹⁹ Feinsod Affidavit ¶ 8, R. 178-80. Reduced fares

¹⁸ Federal appellant would dismiss the finding of the court below that publicly owned mass transit is a traditional governmental function by contending that some of the same reasoning could be applied to the Long Island Rail Road, a state-owned passenger railroad. U.S. Br. 20-21. For the reasons stated *infra* p. 27-30, such an approach would ignore the completely local nature of public mass transit, as distinguished from the Long Island Rail Road, which this Court found was an integral part of the interstate rail network and thus had been subject to comprehensive, uniform national regulation for nearly 100 years. *LIRR*, 455 U.S. at 687-90.

¹⁹ Indeed, some states simultaneously combat transit costs and air pollution through funding transit with motor vehicle fuel taxes. See, e.g., Cal. Const. art. 19, § 1; Tex. Rev. Civ. Stat. Ann. art. 1118x § 8 (Vernon Supp. 1982).

are provided for students and the elderly, *id.* ¶ 9B, R. 181-82,²⁰ and fares are kept low in the face of rising costs, making transportation accessible to the poor and the low and middle income workers, *id.* ¶ 9A, R. 180.

As the court below found, referring to *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979):

Public transit benefits the community as a whole, . . . is provided at a heavily subsidized price[,] . . . [and] cannot be provided at a profit[, and therefore is provided] for public service, not for pecuniary gain. [Thus] government is particularly well suited . . . [and, in fact,] is the only component of society that can provide the service.

Finally, government today is the primary provider of transit services.

U.S.J.S. 16a.

Appellants' attempt to characterize local publicly owned transit as a "business enterprise," which is the express premise for all the arguments made by Appellant Garcia, *see, e.g.,* G. Br. 6, is absolutely erroneous. State and local governments do not provide transit services in order to compete with the private sector in a profit-making activity.²¹ Instead they have responded to the community-

²⁰ See also, *e.g.,* Mass. Gen. Laws Ann. ch. 161A, § 5(e $\frac{1}{2}$)-5(e $\frac{3}{4}$) (West 1976 & Supp. 1983).

²¹ Federal appellant argues that states provide transit services as "market participants" rather than "as a traditional and essential element of state sovereignty." U.S. Br. 22-24 & note 23. This dichotomy is falsely applied for two primary reasons. First, *National League of Cities* does not require that the state service, *e.g.,* transit or sanitation, be an essential element of state sovereignty, but rather that the state decision to be preempted, *e.g.,* setting wages and hours, be such. See *supra* p. 13. Second, while *White v. Mass. Council of Constr. Employers*, 103 S. Ct. 1042 (1983), found that a limitation on state activity imposed by the Commerce Clause—that states may not unduly burden interstate commerce—is not applica-

wide need for this service regardless of its commercial viability. In *Jackson Transit Authority*, 457 U.S. at 17, quoted in U.S. Br. 26-27, this Court acknowledged the congressional finding that communities should "continue to receive the benefits of mass transportation despite the collapse of the private operations," thereby recognizing that public transit services are not revenue-raising ventures but are provided for public benefit. APTA is unaware of any publicly owned local transit system that does not have to draw on its local tax base to meet its costs. Feinsod Affidavit ¶¶ 6-8, R. 178-79.

Fares which provide only about 40 percent of transit operating revenues²² do not offer much prospect for the survival of public transit in the competitive environment federal appellant desires. See U.S. Br. 13-14, 47-48. Nor do such user fees distinguish local public transit from other functions of government expressly protected in *National League of Cities*.²³ User fees often recover some of the operating costs of sanitation systems, public hospitals,

ble when states act as market participants, this should not affect the States' Tenth Amendment immunity. Indeed, state and local governments did not enter into provision of transit services as market participants; they are not competing for profitable business with the private sector, but instead have assumed an important public function the private marketplace cannot provide.

²² *Transit Fact Book* 45. The remaining operating revenues are derived principally from state and local assistance, which constitutes 40 percent of such revenues, as contrasted with federal operating assistance which constitutes only 17.3 percent. *Id.* It is beyond doubt that states do not provide transit services to "engag[e] in business activities which have as their aim the production of revenues in excess of costs." See *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 418 n.1 (1978) (Burger, C.J., concurring).

²³ See also Urban Mass Transportation Administration, U.S. Department of Transportation, *Financing Transit: Alternatives for Local Government* 228 (1979).

parks and recreational facilities and even public schools.²⁴ Sometimes such charges finance a greater share of the costs of such traditional public services than do public transit fares.²⁵

That the provision of public transit services is an integral governmental function is further demonstrated by the extensive disruption to community life that would result if state and local government were unable to structure routes and schedules as they believe best. "[P]articuliarized assessments of actual impact" of federal regulations, of course, are not necessary since it is the State's policy choices that are constitutionally protected. *National League of Cities*, 426 U.S. at 851. "The determinative factor . . . [is] the nature of the federal action, not the ultimate economic impact on the States." *FERC*, 456 U.S. at 770 n.33 (quoting *Hodel*, 452 U.S. at 292 n.33). The FLSA overtime requirements, however, do have a direct impact on the ability of state and local governments to choose how to structure routes, employee work hours, service schedules, record keeping and compensation.²⁶

For example, the FLSA requires overtime payment of time-and-one-half the "regular rate" for hours worked over forty hours per week, which is computed in accord-

²⁴ See *Mueller v. Allen*, 103 S. Ct. 3062 (1983) (some public schools also charge tuition or user fees).

²⁵ For example, the Federal Water Pollution Control Act, 33 U.S.C. § 1284(a)(4)-(b)(1) (1976 & Supp. V 1981), requires states receiving sewage treatment plant and areawide waste treatment management grants to recover from industrial users the full cost of the federal grants attributable to treatment of their waste and from other users the full cost of maintenance and operation of treatment facilities.

²⁶ See, e.g., *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 303 (1965) (testimony of C. Cochran).

ance with a federal statutory formula. 29 U.S.C. § 207(a) (1976); 29 C.F.R. § 548 (1983). Unlike the private sector, state and local governments cannot decide on strictly economic terms whether to minimize costs under this requirement by hiring more employees,²⁷ or by designing routes and work schedules to reduce the amount of overtime needed. Public transit systems must set scheduling and make arrangements for work hours that enable them to provide essential community services. Special payment provisions have evolved through the years to compensate public transit operators for unique working requirements, such as the scheduling of bus drivers in two split shifts at peak commuter hours. See, e.g., K. Chomitz and C. Lave, *Forecasting the Financial Effects of Work Rule Changes*, 37 Transp. Q. 453 (1983). If the FLSA provisions are superimposed on the pay structures the States have designed to respond to these special scheduling and other operational needs, substantial additional costs will be incurred.²⁸ A city with a restricted budget, as most are, may have to curtail service to points at the end of routes to avoid excessive overtime costs. If service at those hours is curtailed, the low and middle income people dependent on public transportation may be limited in the locations they can accept employment or may be forced to spend much more time commuting. Street traffic congestion will likely increase, perhaps necessitating use of additional police to direct traffic. Additional traffic would result in increased air pollution, see *Transit Fact Book*

²⁷ Indeed, Congress assumed that such cost minimization would be a natural result of the FLSA overtime provisions. See, e.g., S. Rep. No. 1487, 89th Cong., 2d Sess. 22, reprinted in 1966 U.S. Code Cong. & Ad. News 3002, 3024 ("the committee believes that new jobs will become available as the excessive hours worked by present employees are reduced.").

²⁸ Labor costs in the form of salaries and fringe benefits are of critical significance to the management of transit systems. In 1980, for example, they comprised more than 70 percent of all operating expenses. *Transit Fact Book* 49.

38, perhaps causing additional expenditures to reduce other sources of pollution. This Court was critical in *National League of Cities*, 426 U.S. at 847, of "[t]his type of forced relinquishment of important governmental activities."

Application of FLSA requirements thus would leave the States with "less money for other vital State programs," and would limit their ability to pursue their "social and economic policies beyond their immediate managerial goals." See *EEOC*, 103 S. Ct. at 1063. Of course, to minimize the cost impact of the federal requirements the States could change their scheduling practices, but this would "have the effect of coercing the States to structure work periods in some employment areas . . . in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation." *National League of Cities*, 426 U.S. at 850. "Nothing in the Constitution permits Congress to force the states into a Procrustean national mold that takes no account of local needs and conditions. That is the antithesis of what the authors of the Constitution contemplated for our federal system." *EEOC*, 103 S. Ct. at 1075 (Burger, C.J., dissenting).

B. The Provision Of Publicly Owned Local Mass Transit Services Is Not A New Concept In State And Local Government Responsibility.

Appellants contend that, because local mass transit has become a pervasively state and local governmental function in recent decades, it cannot be protected under *National League of Cities*. Federal appellant, for example, urges this Court to give "primacy . . . to historical evidence," U.S. Br. 25, and to base its decision on whether the States have regarded transit services as an integral part of their governmental activities "since the inception of the industry." *Id.* at 24. Any such "static historical view" was expressly rejected by this Court in *LIRR*, 455 U.S. at 686, when it clarified that it would "not merely

... look[] only to the past to determine what is 'traditional.'" *Id.* It stated:

This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation.

Id. at 686-87. *Cf. First National City Bank v. Banco Para El Comercio Exterior*, 103 S. Ct. 2591, 2603 n.27 (1983).

The provision of a local transportation infrastructure has been an integral function of state and local governments since the earliest days of our Republic.²⁹ See *Molina-Estrada*, 680 F.2d at 845. With the industrial age and the growth of the nation's urban areas, local streets and roads became inadequate to meet this governmental obligation. Indeed, "[i]n 1905 congested traffic at rush hours was described as the number one problem of large cities in the United States." W. Owen, *The Metropolitan Transportation Problem* 6 (rev. ed. 1966). As the problems of urbanization (such as unemployment, traffic congestion and safety, air pollution and mobility for students and the elderly) increased, state and local governments turned to developing public transit technology to meet community-wide needs.

Several major cities entered into the provision of publicly owned transit services financed through state and local bond issues or taxes early in this century.³⁰ In fact,

²⁹ Even before the ratification of the federal Constitution, in Massachusetts "townships [were] obliged by law to keep their roads in good repair." A. de Tocqueville, *Democracy in America* 77 n.29 (J.P. Mayer ed. 1969) (citing *Laws of Massachusetts*, Law of March 5, 1787, Vol. I, p. 305).

³⁰ See, e.g., C. Thompson, *Public Ownership* 225-26, 240-41 (1925). As early as 1925, this author commented: "So we now have in America not only numerous smaller cities owning and successfully

before the enactment of UMTA providing federal financial assistance, more than half of the nation's 21 largest cities provided publicly owned transit services. *See infra* p. 36.

By 1978, about 90 percent of transit revenues, total transit miles, total transit vehicles owned and leased, and linked passenger trips were attributable to publicly owned mass transit systems. Feinsod Affidavit ¶ 4, R. 176-77; *Transit Fact Book* 43. Today almost all of the metropolitan areas in the country with a population over 200,000 are served by transit systems owned by state or local government agencies.³¹

Moreover, local governments in rural areas also have responded to the need for public mass transit. By 1981, 248 out of 339, or 73 percent, of transit systems in non-urbanized areas were publicly owned.³² The pervasiveness of state and local ownership of public transit is compar-

operating municipal street car lines, but three of our larger cities [are also doing so]." *Id.* at 222. San Francisco had started providing local public mass transit service in 1912, Seattle in 1919, Detroit in 1922 and New York City in 1932. Cleveland acquired its public transit system in 1942, and public transit systems serving Boston and Chicago were acquired in 1947. American Public Works Association, *History of Public Works in the United States, 1776-1976* 177 (1976). Los Angeles, San Antonio, and Sacramento were served by publicly owned systems by 1959, J. Moody, *Moody's Transportation Manual* a70 (1960), Oakland by 1960, Memphis by 1961, J. Moody, *Moody's Transportation Manual* a72 (1961), and Miami in 1962, J. Moody, *Moody's Transportation Manual* a78 (1962). Public transit systems serving Long Beach and St. Louis were acquired in 1963, followed by those serving Dallas and Pittsburgh in early 1964, J. Moody, *Moody's Transportation Manual* a60-a61 (1964).

³¹ U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population 1-12* (1981).

³² U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service* 13 (1981).

able to other traditional governmental functions expressly listed in *National League of Cities*.³³

Large numbers of state and local governments thus assumed the responsibility for providing mass transit services and funding them from tax revenues after it became clear that essential community-wide transit services could not be operated in a manner that would meet public needs and demands unless operated by a state or local government.³⁴ States have undertaken this function because they regard the maintenance of urban transportation infrastructures accessible to all residents "as integral parts of their governmental activities," *National League of Cities*, 426 U.S. at 854 n.18, and as "governmental services which their citizens require," *id.* at 847. These services, moreover, are for the benefit of the local community, rather than as part of an integrated network that serves all parts of the country. Thus, local publicly owned mass transit is the type of public service that the States have determined over many years is necessary to meet their fundamental public welfare obligations in the fulfillment of their "role in the Union." *LIRR*, 455 U.S. at 687.³⁵

³³ The fact that private institutions also provide some local transit services (i.e., carrying about 6 percent of the passengers, *Transit Fact Book* 27, 43) cannot be a determinative factor under *National League of Cities*, since private institutions provide services in other areas protected by that decision. In 1979, for example, private schools accounted for 20 percent of elementary schools, 19.3 percent of secondary schools, and 56.5 percent of post-secondary schools. U.S. Department of Commerce, *Statistical Abstract of the United States*, Table 214 at 132 (1981) (published annually) ("SAUS: 19xx"). Moreover, in 1974, private firms collected 50 percent of all residential waste and 90 percent of all commercial waste. H.R. Rep. No. 1461, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Ad. News 6323, 6325.

³⁴ *Transit Fact Book* 27; D. Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Indus. and Labor Rel. Rev. 95, 99 (1971). See also *Jackson Transit Authority*, 457 U.S. at 17.

³⁵ The essential and sovereign character of public transit services has been expressly recognized by some state constitutions, see, e.g.,

II. Other Federal Laws Applicable To Local Mass Transit Raised By Appellants Are Irrelevant To The Constitutional Principle At Issue And Do Not Distinguish This Activity Of State And Local Government From Other Activities Protected By *National League of Cities*.

Appellants interject into their analysis of this case a number of federal laws other than the FLSA which are irrelevant to the constitutional principle involved here. This attempt to complicate the picture and obscure the controlling effect of *National League of Cities* fails to provide any constitutionally significant basis for distinguishing publicly owned local mass transit from those activities of state and local government this Court expressly exempted from the FLSA requirements. Nor do appellants' contentions establish any federal interest sufficient to override the States' judgment that their provision of local transit services is as integral to the functions of state and local government as are the enumerated activities.³⁶

Ga. Const. art. 9, §§ 4(2), 5(2); Ill. Const. art. XIII, § 7, and legislatures, see, e.g., *Inman Park Restoration, Inc. v. Urban Mass Transp. Admin.*, 414 F. Supp. 99, 104 (N.D. Ga. 1975), *aff'd sub nom. Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Auth.*, 576 F.2d 573 (5th Cir. 1978); *Henderson v. Metropolitan Atlanta Rapid Transit Auth.*, 236 Ga. 849, 853, 225 S.E.2d 424, 427 (Ga. 1976); *Mass Transit Admin. v. Baltimore County Revenue Auth.*, 267 Md. 687, 690, 298 A.2d 413, 415 (Md. 1973); *Teamsters Local Union No. 676 v. Port Auth. Transit Corp.*, 108 N.J. Super. 502, 507, 261 A.2d 713, 716 (N.J. Super. Ct. Ch. Div. 1970); *County of Niagara v. Levitt*, 97 Misc.2d 421, 422, 411 N.Y.S.2d 810, 812 (N.Y. Sup. Ct. 1978); *Pennsylvania v. Erie Metropolitan Transit Auth.*, 444 Pa. 345, 350, 281 A.2d 882, 885 (Pa. 1971).

³⁶ Federal appellant also attempts to distinguish publicly owned mass transit from the other protected activities by reliance on an early tax case, *Helvering v. Powers*, 293 U.S. 214 (1934), which held that the Trustees of the Boston Elevated Railway Company were not immune from federal income taxation. The activity addressed in that case, however, was the temporary quasi-public operation of

A. Traditional Federal Statutory Regulation Would Not Be Eroded If The Fair Labor Standards Act Is Not Applicable To State And Local Public Transit Agencies.

Appellants strain to bring this case within the limitation on Tenth Amendment immunity addressed in *LIRR*. In upholding the application of the Railway Labor Act to the employees of the state-owned Long Island Rail Road, this Court followed and expressly affirmed its decision in *National League of Cities*. Following a line of prior Supreme Court decisions involving statutes other than the FLSA—*Parden v. Terminal Railway*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *United States v. California*, 297 U.S. 175 (1936)—this Court stated in *National League of Cities* that “the operation of a railroad engaged in ‘common carriage by rail in interstate commerce . . .,’ ” 426 U.S. at 854 n.18 (citation omitted), is not “in an area that the States have

a privately owned transit system. *Cf. Fry v. United States*, 421 U.S. 542 (1975). As Justice Rehnquist stated in his dissent in *Fry*, *id.* at 555 n.1: “The Court in [the later decided] *Helvering v. Gerhardt*, 304 U.S. 405, 424 (1938), was careful to distinguish between the imposition of a federal income tax on the New York Port Authority, a question which it reserved, and such a tax upon an employee of the Authority, a question which it decided in favor of taxability.” Moreover, reference to this 1934 case does not answer whether public transit has become a traditional function of government as the result of the widespread establishment of public transit services by state and local governments since then. As Justice Black noted in his concurring opinion in *Gerhardt*,

[m]any governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.

304 U.S. at 427; see also *Massachusetts v. United States*, 435 U.S. 444, 458-59 (1978) (Brennan, J., concurring); *Graves v. New York*, 306 U.S. 466 (1939).

regarded as integral parts of their governmental activities," *id.*³⁷

This Court further determined in *LIRR* that a state would "erode federal authority in areas traditionally subject to federal statutory regulation," 455 U.S. at 687, if it could exempt its employees from federal Railway Labor Act protection by acquiring a small but integral part of the national railroad system that has long been subject to federal Commerce Clause legislation specifically directed at that integrated system. This statement was made, however, in the context of what was perhaps a unique function for a state to acquire, *i.e.*, railroads, which even when publicly owned still serve as part of the national railroad system³⁸ and *qua* railroads, public or private:

have been subject to *comprehensive* federal regulation for nearly a *century*. The Interstate Commerce Act—the first *comprehensive* federal regulation of the industry—was passed in 1887. A year earlier we had held that *only* the Federal Government, not the states, could regulate the interstate rates of railroads. . . . The first federal statute dealing with railroad labor relations was the Arbitration Act of 1888. . . . The Railway Labor Act thus has provided the framework for collective bargaining between all interstate railroads and their employees for the past 56 years. There is no comparable history of long-

³⁷ The Court noted in *LIRR* that only two of the seventeen commuter railroads were publicly owned. 455 U.S. at 686 n.12.

³⁸ Indeed, federal appellant represented to this Court in *LIRR* that "the *LIRR*, despite the evolving character of its operations, remains a railroad—an integral part of the interstate railroad industry and plainly distinguishable from conventional intraurban transit systems." Brief for United States as Amicus Curiae at 12, *LIRR*, 455 U.S. 678 (1982) (emphasis added). "As is reflected in the definitions and statutory provisions cited . . . one important attribute of commuter railroads is their genesis as a part of the railroad industry, rather than as a form of intraurban transit." *Id.* at 26 n.19 (emphasis added); see also *id.* at 25-27, nn.19-20.

standing state regulation of railroad collective bargaining or of other aspects of the railroad industry. 455 U.S. at 687-88 (footnotes omitted; emphasis added). "Moreover, the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system." *Id.*³⁹ The Long Island Rail Road acceded to this federal regulatory authority for the first 13 years of its ownership by the state, *id.* at 690;

³⁹ In *LIRR*, the Court stressed that "Congress [had] long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy." 455 U.S. at 688. Under these circumstances, "[t]o allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any other of the elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system." *Id.* at 689.

Extrapolating from this Court's concern in *LIRR* for preserving the perhaps unique, comprehensive, uniform federal regulation of railroads, federal appellant suggests that "substantial deference" is due the congressional determination that there should be uniformity in the FLSA between public and private transit agencies in order to avoid "unfair competition." U.S. Br. 13-14, 46-48. But this congressional desire for uniformity is of a wholly different nature from that in *LIRR* and was as much a reason why Congress in 1974 sought to bring within the FLSA many other public activities, including activities expressly protected in *National League of Cities*. H.R. Rep. No. 1366, 89th Cong., 2d Sess. 16-17 (1966); S. Rep. No. 1487, 89th Cong., 2d Sess. 8, reprinted in 1966 U.S. Code Cong. & Ad. News 3002, 3009-10. It is highly misleading for federal appellant to imply that Congress amended the FLSA because of a unique concern with eliminating some perceived "unfair competition" between public and private transit; in fact, the congressional reports cited for this proposition, *id.*, address the amendment of the FLSA definition of "enterprises" which affected coverage of public schools, hospitals, institutions and transit systems. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(c), 80 Stat. 830, 831. Furthermore, contrary to federal appellant's statement, U.S. Br. 36 n.29, sewage treatment has been privately provided in some cities, C. Thompson, *Public Ownership* 290 (1925); cf. Advisory Comm'n on Intergovernmental Relations, *Intergovernmental Responsibilities for Water Supply and Sewage Disposal in Metropolitan Areas* 15-16 (1962), and thus the same concern for competition could have arisen in that field.

it was only in the midst of the cooling-off period during a strike that the state attempted a conversion of the Long Island Rail Road's corporate status, "apparently believing that the change would eliminate Railway Labor Act coverage," *id.* at 681.

Local mass transit, in contrast, has always been a local responsibility. There simply is not, and never has been, any comprehensive federal system of law regulating local mass transit, private or publicly owned. See *Local Division 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 633 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982). State or local laws have dictated, for example, the rates charged users of local transit,⁴⁰ equipment standards for transit vehicles,⁴¹ the licensing of drivers of those vehicles,⁴² and traffic safety rules.⁴³

It simply cannot be said that when state and local governments entered this area they "knew of and accepted" the application of the FLSA. *Cf. LIRR*, 455 U.S. at 690. The statutory history of the FLSA is instructive. First,

⁴⁰ See, e.g., Cal. Pub. Util. Code §§ 210, 216, 451 (West 1975 & Supp. 1983); N.Y. Transp. Law § 141 (McKinney 1975 & Supp. 1983); Wash. Rev. Code Ann. §§ 81.64.010, 81.64.080 (1962).

⁴¹ See, e.g., Cal. Pub. Util. Code § 7810 (West 1965); Cal. Veh. Code §§ 26711, 35106, 35250, 35400, 35550-35551.5 (West 1971 & Supp. 1983); Ill. Ann. Stat. ch. 95 ½ §§ 1-107, 15-102 (Smith-Hurd 1971 & Supp. 1983); N.Y. Veh. & Traf. Law §§ 104, 375, 385 (McKinney 1970 & Supp. 1983); Wash. Rev. Code Ann. §§ 46.04.320, 46.37.005-46.37.500 (1970 & Supp. 1983).

⁴² See, e.g., Cal. Veh. Code § 12804 (West 1971 & Supp. 1983); Ill. Ann. Stat. ch. 95 ½ §§ 1-146, 6-104 (Smith-Hurd 1971 & Supp. 1983); N.Y. Veh. & Traf. Law § 509a-509h (McKinney Supp. 1983); Wash. Rev. Code Ann. § 46.20.440 (1970 & Supp. 1983).

⁴³ See, e.g., Cal. Veh. Code §§ 21000 *et seq.* (West 1971 & Supp. 1983); Ill. Ann. Stat. ch. 95 ½ §§ 11-100 *et seq.* (Smith-Hurd 1971 & Supp. 1983); N.Y. Veh. & Traf. Law §§ 1100 *et seq.* (McKinney 1970 & Supp. 1983); Wash. Rev. Code Ann. §§ 46.61.005 *et seq.* (1970 & Supp. 1983).

it is a general statute applicable to virtually every private business engaged in interstate commerce; it is not a statute setting up a regulatory system with respect to a specific industry. Second, although applicable to many other private employers since first enacted in 1938, Congress did not even attempt to apply the FLSA to regulate the wages and hours of even private transit employees until 1961.⁴⁴ Its first limited attempt to extend these requirements to *public* transit employees (along with employees of public hospitals and schools) was in 1966, and even then Congress specifically excluded most private and public transit employees (*e.g.*, bus drivers and other operators) from the overtime requirements. Even after *Wirtz*, when Congress attempted to extend the FLSA requirements to most public agencies, overtime coverage of public and private transit operating employees was to be phased in; it was not until 1976, only seven years ago, that Congress intended to extend the full reach of federal wage and hour regulation to most local public transit employees,⁴⁵ and only four years ago (just two months before this action was filed) that the Executive Branch sought to implement this congressional directive.⁴⁶ State and local governments began to provide transit services prior to the enactment of the FLSA and well before Congress' attempt to extend it to private or public transit. About the time Congress attempted to apply the provisions of the FLSA to any transit system—public or private—the majority of major urban areas was served by publicly owned transit systems,⁴⁷ and the majority of

⁴⁴ Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72.

⁴⁵ Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 21(b), 88 Stat. 55, 68.

⁴⁶ See *supra* text accompanying note 7.

⁴⁷ See *infra* p. 36.

transit employees worked for publicly owned systems.⁴⁸ Furthermore, when Congress or the Department of Labor did act, those actions were immediately challenged in the courts.⁴⁹

Federal appellant concedes that "the specific federal legislation at issue here is of comparatively recent vintage," and "Congress did not fully exercise its [alleged] powers to legislate respecting terms of employment in the transit industry until relatively recently." U.S. Br. 41-42. Thus federal appellant demonstrates that the States' provision of local transit services did not "erode federal authority in areas traditionally subject to federal statutory regulations," *LIRR*, 455 U.S. at 687. Rather, the federal government here seeks to extend its power into an activity the States were already conducting and into an area of historic regulation by the "States as employers." See *Hodel*, 452 U.S. at 286 (quoting *National League of Cities*, 426 U.S. at 841).⁵⁰ "[T]he Federal

⁴⁸ By late 1964, 56 percent of transit employees worked for public authorities. *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess.* 297 (1965) (testimony of C. Cochran).

⁴⁹ Federal appellant would have this Court ignore the fact that the Court's view of the Tenth Amendment has changed since 1966 when *Wirtz* was decided. See U.S. Br. 49-50 and n.38. It is not clear what federal appellant means by warning against a "doctrine of creeping unconstitutionality," *id.* at 50. No sinister scenario is suggested by the answer to federal appellants' question: "[o]n what date did the public transit provisions of the FLSA, assuredly valid when enacted, become unconstitutional?" *Id.* That date was June 24, 1976 when *National League of Cities* overruled *Wirtz*.

⁵⁰ The court below recognized that:

the FLSA is not a current manifestation of a traditional federal concern for labor relations in the mass transit field. Transit was specifically exempted from coverage from the time of the Act's original passage in 1938 until 1961 amendments subjected private transit operators to minimum wage provisions (but not the overtime pay provisions). Pub. L. No. 75-78, § 13(a)(3), 52 Stat. 1067 (1938); Pub. L. No. 87-30, §§ 2(c),

Government cannot usurp traditional state functions [just as] there is no justification for a rule which would allow the states . . . to erode federal authority in areas traditionally subject to federal statutory regulation." *LIRR*, 455 U.S. at 687.

The fact that some activities protected by *National League of Cities* were at one time conducted more significantly in the private sector than in the public sector was not relevant to that decision. Perhaps this was because, unlike the acquisition of an interstate railroad, there was no reason to believe that a tradition of federal statutory regulation would be eroded by state acquisition of such activities. For, like local mass transit, and unlike railroads where there is "no comparable history of long-standing state regulation," *LIRR*, 455 U.S. at 688, the protected activities in *National League of Cities* were subject to extensive state regulation.⁵¹ These are functions within the traditional sphere of state responsibility, and nothing in *LIRR* suggests that state acquisition of a private hospital, university or local mass transit system would so erode federal regulatory authority as to deny the States the immunity established by *National League of Cities*. Indeed, publicly owned hospitals, recreational facilities, schools and universities, museums

9, 75 Stat. 65, 66, 72 (1961). Public employers remained entirely exempt until 1966. *Diminution of federal authority resulting from private to public conversions during this period would have been attributable to the statutory exemption and consistent with congressional intent.*

U.S.J.S. 7a-9a (emphasis added).

⁵¹ Hospital regulation includes state licensing of hospitals and medical personnel. See American Hospital Association, *AHA Guide C18-C19* (1983). Similarly, education, police and fire protection are heavily state-regulated. See, e.g., Education Commission of the States, *Working Paper No. 2, Survey of States' Teacher Policies*, Tables I-IV (Oct. 1983) (teacher certification); Education Commission of the States, *A 50-State Survey of Initiatives in Science, Mathematics and Computer Education* 29-41 (1983) (curriculum guidelines and graduation requirements).

and sanitation services that have been acquired from the private sector are no longer subject to FLSA requirements.

In an attempt to fabricate an unconstitutional erosion of comprehensive federal regulation, appellants cite other general federal labor laws which apply to private local transit. U.S. Br. 39-40; G. Br. 19-20. But the statutes cited do not establish a *comprehensive* scheme of federal regulation unique to transit labor relations, as, for example, the Railway Labor Act does for railroads. Instead, the cited statutes regulate particular employment conditions for virtually all private employers in interstate commerce, including the private counterparts of the activities expressly protected in *National League of Cities*. In contrast, public employers, including publicly owned transit systems, are generally exempt from such federal labor laws and instead are subject to state collective bargaining laws that govern wages and hours for their employees. U.S. Department of Labor, *Summary of Public Sector Labor Relations Policies* (1981).⁵²

Thus, the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981), regulates the private conduct of all the activities listed in *National League of Cities*, e.g., private hospitals and schools, as well as pri-

⁵² Federal appellant also cites some federal statutes that apply to traditional governmental functions, such as the Equal Pay Act, 29 U.S.C. § 206 (1976 & Supp. V 1981), which was upheld against Tenth Amendment challenge in *Pearce v. Wichita County*, 590 F.2d 128 (5th Cir. 1979). Like *EEOC*, in which the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981), was upheld against Tenth Amendment challenge by a state park game warden, *Pearce* involved an employment category, public hospital employees, which with respect to the FLSA was expressly immunized by *National League of Cities*. Thus, the fact that some federal labor laws may even apply to traditional governmental functions does not make the particular governmental functions any less traditional for the purposes of the FLSA wage and overtime compensation requirements—which *National League of Cities* held cannot be imposed on the States.

vate transit, but it specifically exempts state and local government employees, including public transit employees. 29 U.S.C. § 152(2) (1976). *See also Jackson Transit Authority*, 457 U.S. at 23. For this reason the district court concluded, "any diminution of federal authority under the NLRA that results from a private to public conversion is attributable to this statutory exemption, not to the Tenth Amendment, and is consistent with congressional intent." U.S.J.S. 7a-9a. Furthermore, the statutes cited, except perhaps the NLRA, were enacted after the state and local governments of many of the nation's major metropolitan areas were providing local public transit services. *See supra* note 30. Unlike the railroad regulation in question in *LIRR* and the national emergency wage freeze legislation at issue in *Fry*, regulation of the labor relations of local mass transit, publicly or privately owned, has not presented a problem that Congress believed "only collective action by the National Government might forestall." *National League of Cities*, 426 U.S. at 853.

B. By Accepting Federal Financial Assistance, The States Should Not Be Held To Have Tacitly Unleashed Boundless Federal Commerce Clause Authority.

Unless this Court adopts a "static historic view,"⁵³ appellants have not presented any convincing reasons why publicly owned local transit services are constitutionally distinguishable from activities expressly protected in *National League of Cities*. Appellants thus search for another constitutionally significant basis upon which to justify federal usurpation of the States' authority to fix the hours and wages of their public transit employees. They seize upon the federal funding to the States under UMTA to shore up their weak argument that the FLSA may

⁵³ This view, of course, was rejected in *LIRR*, 455 U.S. at 686.

be applied to publicly owned local transit. The significance of UMTA funding is elusive, however.

1. This Court was well aware that the activities protected in *National League of Cities* received substantial federal financial support, *see* 426 U.S. at 878 (Brennan, J., dissenting); yet the Court nevertheless held that the FLSA could not be applied to them. UMTA funding is no more significant than the federal funding of other traditional activities simply because, if appellants' allegations are correct, it provided an incentive for public ownership.

Contrary to appellants' contention, U.S. Br. 12, 17, 26, 28; G. Br. 20-21, the trend toward public ownership of local mass transit was well established before the enactment of UMTA. Prior to the availability of UMTA funds, the majority of the largest urban centers had publicly owned transit systems. Of the nation's twenty-one largest cities (*i.e.*, with populations in excess of 500,000), twelve were served by publicly owned transit systems by 1964. *Compare supra* note 30 with *SAUS: 1965*, Table 14 at 19-20. There is no doubt that federal aid helped many cities, particularly smaller cities, to fulfill their responsibility to provide transit services when private systems were unable to satisfy the public welfare obligations that urban transit had assumed.⁵⁴ But state and local governments have obligated substantial portions of their limited resources to perform this service because it is an integral part of their traditional function of facilitating intra-urban transportation.⁵⁵ It is simply historical revi-

⁵⁴ "Today nine-tenths of the mounting expenses of city governments are for services that did not exist at the turn of the century—traffic engineering, airports, parking facilities, health clinics, and a long list of others." W. Owen, *The Metropolitan Transportation Problem* 4-5 (rev. ed. 1966).

⁵⁵ As noted *supra* note 22, state and local operating assistance contributes a substantially greater share of public transit revenues than does federal operating assistance. *Transit Fact Book* 45. State

sionism to imply that state and local governments provide transit services because federal aid enticed them into doing so. Indeed, Congress made clear that UMTA was not intended to encourage the acquisition of private transit systems by public agencies. *See, e.g.*, 49 U.S.C. § 1602(e) (1976 & Supp. V 1981); S. Rep. No. 82, 88th Cong., 1st Sess. 19 (1963); H.R. Rep. No. 204, 88th Cong., 1st Sess. 12, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2581; 110 Cong. Rec. 14,905 (1964) (statement of floor leader Rains). Rather, Congress responded to pleas from state and local government officials for financial assistance that would help the States preserve a function they believed critical to the local public welfare,⁶⁶ and therefore a "core state function." *EEOC*,

and local governments have also provided substantial capital funds. *See id.* at 29. Federal appellant's argument regarding federal funding of transit is grossly misleading. *See, e.g.*, U.S. Br. 34-36. He states that "the federal government . . . has supplied a larger share of [transit] operating subsidies than state government in many recent years," *id.* at 34, but this ignores the facts stated in appellant's own source that during those years local governments have provided a substantially greater share of operating assistance than has the federal government and that state and local government assistance combined has been in the range of 70-80 percent of all government operating assistance. *Transit Fact Book* 28-29. Another incomplete quotation in federal appellant's brief, U.S. Br. 31, implies that APTA has conceded the importance of federal funds to widespread state and local government takeover of transit services. He fails to include the first part of the sentence, which states: "*The relatively small amount of funding during the 1960s was used by many cities to buy the vehicles and facilities owned by private transit systems that were on the verge of bankruptcy.*" *Transit Fact Book* 29 (emphasis added).

⁶⁶ *See* U.S. Br. 12; *see also* *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 88 (1963) (statement of J.F. Collins, Mayor of Boston); *id.* at 91 (statement of E. Peabody, Governor of Massachusetts); *id.* at 312 (statement of P.H. Sacha, Chairman of Maryland Metropolitan Transit Authority); *id.* at 414-15 (statement of W.D. McClelland, Chairman of the Board of County Commissioners of Allegheny County); *Urban Mass Transporta-*

103 S. Ct. at 1060. Federal grant aid to cities in support of transit services—like federal aid to education, hospitals and law enforcement—simply demonstrates that Congress thought it important that states be able to meet their local public welfare responsibilities in these areas.⁵⁷

No doubt changing circumstances such as the increased use of automobiles and the migration to the suburbs, which were due in large part to substantial federal highway funding,⁵⁸ contributed greatly to the collapse of pri-

tion—1963: Hearings on S. 6 and S. 917 Before a Subcomm. of the Senate Comm. on Banking and Currency, 88th Cong., 1st Sess. 188-89 (1963) (statement of G.S. Clinton, Mayor of Seattle).

⁵⁷ Federal funding has not made state provision of sanitation, health or educational services any less a traditional governmental function. Many such state and local programs would not have existed without federal funding. For example, federal funding of advanced waste treatment facilities began in 1956. The Senate Report on the Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (repealed 1970), refers to "the long period of disregard and neglect that preceded Federal legislation in this field." S. Rep. No. 1367, 89th Cong., 2d Sess. 7, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3969, 3975. Similarly, comprehensive, statewide health planning was "spotty and fragmented" prior to federal funding of such planning, *see* H.R. Rep. No. 2271, 89th Cong., 2d Sess. 4, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3830, 3833. *See also* National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, §§ 1512, 1513, 88 Stat. 2225, 2232-39 (specifies structure and functions of local health systems agencies, which may themselves be local governmental units); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(a), 89 Stat. 773, 774 ("State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children;" the federal role is to be "a catalyst to local and State program growth," S. Rep. No. 168, 94th Cong., 1st Sess. 5, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1429).

⁵⁸ *See* S. Rep. No. 82, 88th Cong., 1st Sess. 4 (1963).

vate urban transit systems.⁵⁹ UMTA represents in part a congressional attempt to redress the imbalance between federal highway funding and support for mass transit so that the States could fashion the "completely balanced transportation system," *see* U.S. Br. 29, that they believe would best meet the needs of local residents and the community at large.⁶⁰

2. Appellants' argument must therefore rest on the onerous notion that by accepting federal funds to assume a function necessary to the life of the community, state and local governments—without express notice in the statute or in a condition of the grant—unleashed boundless federal Commerce Clause authority over an integral activity otherwise entitled to Tenth Amendment protection.

This argument is so wholly inconsistent with this Court's precedents that it must be scrutinized closely. *See, e.g., Pennhurst*, 451 U.S. at 17; *Harris v. McRae*, 448 U.S. 297 (1980); *Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279 (1973).

Like the program of aid for the developmentally disabled at issue in *Pennhurst*, UMTA "is a federal-state grant program whereby the Federal Government provides financial assistance to participating States" for the provision of public mass transit services. 451 U.S. at 11. It is not any different fundamentally from federal grant programs that assist schools, hospitals, police and fire departments and sanitation.⁶¹ "Like other federal-state coopera-

⁵⁹ H.R. Rep. No. 204, 88th Cong., 1st Sess. 4, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2571-72.

⁶⁰ S. Rep. No. 82, 88th Cong., 1st Sess. 4 (1963); H.R. Rep. No. 204, 88th Cong., 1st Sess. 4, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2571-72; 110 Cong. Rec. 14,907 (1964) (statement of floor leader Rains).

⁶¹ Federal funding of other traditional governmental functions has far exceeded that of local public mass transit. The federal ap-

tive programs, the Act is voluntary and the States are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of federal funding."

pellant states that "[b]y 1978 more than \$13 billion in [federal] aid [to transit] had been awarded under the UMT Act and other federal programs. . . . Federal capital grants exceeded \$2 billion annually in fiscal 1978 and 1979." U.S. Br. 27-28. In comparison, however, between 1965 and 1978 (excluding 1967, for which data are not available), more than \$57.8 billion in federal aid was given to public elementary and secondary schools. (For years 1966, 1970, and 1975-78, see *SAUS: 1981*, Table 218 at 135; for years 1965, 1968 and 1969, see *SAUS: 1970*, Table 149 at 105; for years 1971 and 1972, see *SAUS: 1972*, Table 157 at 106; for 1973, see *SAUS: 1976*, Table 186 at 117; and for 1974, see *SAUS: 1980*, Table 222 at 141.) For the two-year period, 1977-78, the federal government provided \$7.7 billion in aid to public elementary and secondary schools. W. Grant & L. Eiden, *Digest of Education Statistics*, Table 66 at 75 (1982).

Similarly, a comparison of federal funding of sanitation and public transit shows that during the ten-year period, 1971-81, the federal government had awarded states \$27.11 billion in sewage treatment construction grants. (U.S. Department of the Treasury, *Federal Aid to States* (published annually) ("*FAS: 19xx*"). *FAS: 1971* at 4; *FAS: 1972* at 4; *FAS: 1973* at 6; *FAS: 1974* at 5; *FAS: 1975* at 6; *FAS: 1976* at 8, 27; *FAS: 1977* at 6; *FAS: 1978* at 6; *FAS: 1979* at 7; *FAS: 1980* at 10; and *FAS: 1981* at 9.) In 1979 alone, the federal government provided \$3.7 billion in subsidies for sewage and sanitation services, *FAS: 1979* at 7, which accounted for 31.4 percent of total local expenditures of \$11.77 billion on such services. U.S. Department of Commerce, *Environmental Quality Control, Governmental Finance: Fiscal Year 1978-1979*, Table C at 4 (1981). This compares with only \$2.96 billion in 1979 for local public mass transit operating subsidies and capital grants, or 36.6 percent of available revenues, *Transit Fact Book*, Table 5 at 46 and Table 19 at 67.

With such substantial federal financial assistance now necessary to support the capability of state and local governments to perform essential public services such as education, sanitation, and public local mass transit, it would indeed be an odd constitutional doctrine that drew the line at some arbitrary percentage of federal assistance and rested a fundamental principle of constitutional law on the shifting sands of the federal budget process.

Id. The question in this case is not whether Congress has the power pursuant to the Spending Clause⁶² to condition federal assistance to public transit systems on compliance with the FLSA, because Congress did not impose this condition. In accepting federal assistance to acquire, operate or expand this necessary public service, the States were accepting only the federal authority expressed in the statute or the grant, *Pennhurst*, 451 U.S. at 16-17. UMTA does not condition grants on consent to other federal labor regulations, including the FLSA. Moreover, unlike the Railway Labor Act directly at issue in *LIRR*, UMTA was not enacted pursuant to the Commerce Clause and does not purport to be part of a comprehensive system of federal regulation of local transit, *Local Division*, 589, 666 F.2d at 633-34. Nor does any such system exist. Congress did address labor relations in UMTA, but instead of imposing specific federal conditions such as the FLSA requirements, it deliberately chose a less intrusive approach, providing in section 13(c) that state and local governments should make "arrangements" to preserve existing collective bargaining rights as a condition of federal funding. 49 U.S.C. § 1609(c) (1976). In *Jackson Transit Authority*, 457 U.S. at 27, this Court unanimously held that Congress "did not intend [UMTA] to create a body of federal law applicable to labor relations between local governmental entities and transit workers." Congress respected the States' need for flexibility to manage their labor relations with local transit employees consistently with their public service obligations.⁶³

⁶² The relationship between the Spending Clause and the Tenth Amendment was expressly not addressed in *National League of Cities*, 426 U.S. at 852 n.17. See also *Pennhurst*, 451 U.S. at 17 n.13.

⁶³ In *Jackson Transit Authority*, 457 U.S. at 27, this Court held that section 13(c), which addresses state and local transit employees' collective bargaining rights in, for example, wages and hours,

UMTA's section 13(c) allows the States to select among alternative means to preserve rights of employees of private transit systems. The FLSA, in contrast with section 13(c), is so specific in its wage and hour provisions that it would be impossible for the States to preserve necessary options and at the same time fulfill federal requirements.⁶⁴

does not establish any *federal* rights for employees of transit systems receiving UMTA funds in addition to those rights established by *state* law. This Court stated:

Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations.

Id. at 27 (footnote omitted).

Jackson Transit Authority sharply distinguished the effect of section 13(c) of UMTA on the federal rights of transit workers from the effects of a federal labor statute on the federal rights of railroad employees. *Id.* at 27 n.9. The Court thus found that the law applicable to local public transit workers was *not* similar to its decision in *Norfolk & Western Railroad Co. v. Nemitz*, 404 U.S. 37 (1971), that "a railroad's employees stated federal claims when they alleged a breach of an agreement entered into by the railroad under § 5(2) (f) of the Interstate Commerce Act," *Jackson Transit Authority*, 457 U.S. at 27 n.9; with respect to transit, the Court determined that section 13(c) of UMTA "addresses 'municipal and State problems, and not Federal problems.'" *Id.* at 28 n.11.

⁶⁴ Thus, as this Court concluded in *EEOC*, the FLSA and the ADEA at issue in that case have a very different effect on the States' policy choices. Unlike the FLSA, the ADEA

does not require the State to abandon [its] goals, or to abandon the public policy decisions underlying them.

Perhaps more important, . . . in distinct contrast to the situation in *National League of Cities*, even the State's discretion to achieve its goals in *the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard.

100 S. Ct. at 1062 (citations omitted).

This Court has made clear that:

[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'. . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst, 451 U.S. at 17 (citations omitted). *Pennhurst* and *Jackson Transit Authority*, together, establish that in enacting UMTA Congress has not attempted to require state compliance with the FLSA through the exercise of its Spending Clause power.

It would indeed be a strange conclusion, therefore, that Congress, by providing UMTA funds through the exercise of its Spending Power, has implicitly eliminated the Tenth Amendment limitation on its Commerce Clause powers. Again, as this Court stated in *Pennhurst*, 451 U.S. at 16-17: "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under [some other constitutional] authority [in addition to the Spending Clause when Congress has not] expressly articulate[d] its intent to legislate. . . . The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." Nevertheless, appel-

lants in effect urge this Court to decide that in the enactment of UMTA Congress intended to legislate pursuant to the Commerce Clause, as well as the Spending Power, and to imply a condition on the receipt of federal funds which, as an exercise of Commerce Clause power unrestrained by the Tenth Amendment, would alter permanently the balance of federal-state relations even though the States did not realize the existence of such an implied condition at the time they accepted the federal funds.⁶⁸

3. Appellants also contend that UMTA funding has established a federal interest that outweighs the interests of the States. But, as already noted, *supra* pp. 36-39, the federal funding here, like most federal funding of other traditional functions, is simply helping the States perform a function that they may have chosen to provide. Since the revenue raising ability of states is much more limited than that of the federal government, it is not surprising that states have sought federal financial assistance for public transit as they have done in virtually every other area of traditional state governmental functions.

Federal appellant argues, furthermore, that local public mass transit systems are not "integral to the functioning of state and local governments [because] the very shape of transit systems as they exist today reflects the imprint of *federal policy*" encouraging "comprehensive area wide plan[ning]." U.S. Br. 32-33. If local governments of cities and their suburbs "were induced [by the federal government] . . . to band together and to create metropolitan transit systems spanning the entire urban area," *id.* at 32, this type of federal incentive is indistinguishable from similar federal planning incentives

⁶⁸ Appellants' argument is particularly threatening because it constitutes a realignment that the States cannot cure since the rationale is based on initial, not continuing, acceptance of federal money. *Cf. Guardians Ass'n v. Civil Serv. Comm'n*, 103 S. Ct. 3221, 3229 (1983) (States may prefer to terminate receipt of federal money rather than comply with a condition if they disagree with its interpretation).

that have induced regional coordination among local governmental units in providing many of the public services expressly protected in *National League of Cities*.⁶⁶

State and local governments must have a strong interest in providing a service before they will assume the function, regardless of whether federal funds are available. It drains their limited resources in ways not compensated for by federal funds, as they must match a share of federal funds and generate revenue through the local tax base. It would be a confusion of the respective functions of the different levels of government to conclude that simply because the federal government raises revenues and concurs in the States' judgment that grants should be given to provide a basic community service, that the federal government can impose the full force of federal private sector regulations on state agencies. Through uniform national taxation, the federal government has resources the States cannot approach. If federal revenue is shared with the States to enable them to provide a service they deem integral to community life, the result should not be that at some undetermined time in the future the States, without warning, will find they have surrendered substantial portions of their sovereignty.

⁶⁶ See, e.g., National Health Planning and Resources Development Act, 42 U.S.C. § 300m-4 (1976 & Supp. V 1981) (grants for planning by state health systems agencies and state health planning development agencies); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6942-6949 (1976) (federal grants and guidelines for comprehensive planning for solid waste disposal); Federal Water Pollution Control Act, 33 U.S.C. §§ 1255, 1256, 1281-1291 (1976 & Supp. V 1981) (grants to state agencies for comprehensive water quality control plans and encouragement of areawide waste treatment plans).

III. Alternatively, Application Of The Fair Labor Standards Act To Publicly Owned Local Mass Transit After *National League of Cities* Is Impermissible In The Absence Of A Subsequent Amendment To That Act.

Before *National League of Cities* overruled *Wirtz*, Congress extended FLSA requirements to all state and local government agencies, including public transit agencies. *National League of Cities* struck down as unconstitutional most of the intended coverage.

Despite the presence of a standard severability clause in the FLSA, 29 U.S.C. § 219 (1976), it is not probable that Congress would have intended to enact a law only directed at a small class of public employees if it could no longer carry out its intent to cover all state and local employees.⁶⁷ See *Sloan v. Lemon*, 413 U.S. at 834. This statutory scheme is quite unlike that considered in *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2775 (1983). Several categories of public employees covered by the FLSA were brought within its ambit in 1966; at that time most public transit employees were excluded from the overtime compensation provisions. When the law was broadened in 1974, and the coverage of the large number of transit employees was phased in, Congress was acting on the strength of *Wirtz* and its belief that it could comprehensively regulate wages and hours for all state public employees. The presumption articulated in *Chadha* should not be applied to federal regulation of state activity because congressional regulation of the States has always required express statement of congressional intent. Cf. *Pennhurst*, 451 U.S. 1 (1981).

Moreover, what remains after severance is not "fully operative" and "workable administrative machinery."

⁶⁷ *National League of Cities* expressly eviscerated coverage for what is currently 73 percent of state and local government employees. *SAUS: 1983*, Table 501 at 303.

Chadha, 103 S. Ct. at 2775. Such federal intervention in wage and hour decisions for a small number of state employees and not for others is divisive and may undermine the States' leverage in labor negotiations with its employees not subject to federal law.

Therefore, the minimum wage and overtime compensation provisions of the FLSA should not be applied to publicly owned local mass transit, even if public transit were not an integral operation in an area of traditional governmental function, because these requirements are not severable from the unconstitutional provisions of the statute. This Court may rely on this alternative argument to affirm even though it was not the ground relied on by the lower court. See *Fusari v. Steinberg*, 419 U.S. 379, 387 n.13 (1975).

CONCLUSION

The district court correctly concluded that, like protected activities expressly mentioned in *National League of Cities*, publicly owned local transit services are "important governmental activities," 426 U.S. at 847, which are "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," *id.* at 851 (footnote omitted). Indeed, these are precisely the kinds of public welfare services that "States have traditionally afforded their citizens." *Id.*

Since this Court has held, and repeatedly confirmed, that the precise federal regulation at issue here impermissibly interferes with an essential attribute of state sovereignty—the power to fix wages and overtime compensation—and that when applied to integral operations in areas of traditional governmental functions it "endangers [the States'] 'separate and independent' existence," *LIRR*, 455 U.S. at 690 (quoting *National League of Cities*, 426 U.S. at 851), it follows that publicly

owned local mass transit, as an integral and traditional governmental function, may not be subject to the FLSA.

Accordingly, this Court should affirm the court below.

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Dated: February 3, 1984

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SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
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ARGUMENT

**I. THE TENTH AMENDMENT DOES NOT IMMUNIZE
STATE-OWNED TRANSIT SYSTEMS FROM COM-
MERCE-CLAUSE REGULATION.**

A. Appellees view *National League of Cities v. Usery*, 426 U.S. 833 (1976), as "conclusively decid[ing] that the power of the States to make wage and hour determinations is a function essential to their separate and inde-

pendent existence." San Antonio Metropolitan Transit Authority ("SAMTA") Br. at 15-16 n.10; see American Public Transit Association ("APTA") Br. at 13-14 n.14. And appellees contend that *Transportation Union v. Long Island R. Co.*, 455 U.S. 678 (1982) ("UTU"), creates the narrowest of exceptions, limited to "the context of what was perhaps a unique function for a state to acquire, i.e. railroads," APTA Br. at 28, and justified only by "the[] perhaps unique, comprehensive, uniform federal regulation of railroads," *id.* at 29 n.39; see also SAMTA Br. at 17-18, 21-22. Thus, in the most literal sense, appellees view *UTU* as a "restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

Appellees' argument is flawed in two respects. First, appellees overread *National League of Cities*. If that case had "conclusively decided that the power of the States to make wage and hour determinations is a function essential to their separate and independent existence," its rule would admit of no exceptions and would preclude application of the Fair Labor Standards Act or like legislation to *any* and *all* state employees. But *National League of Cities* does not so hold; the Court expressly couches its holding in more limited terms:

We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8. [426 U.S. at 852]

Consistent with that holding, the Court in *UTU* determined that the operation of a railroad is not an "integral operation[] in [the] area[] of traditional governmental functions" and on that basis concluded that the federal government is empowered to regulate the wages and hours of state employees who operate state-owned railroads. See 455 U.S. at 684.

Second, in attempting to limit *UTU* to railroads, appellees focus on only one of the two discrete parts of the Court's analysis. The first part of that analysis—Part II of the opinion—does not rely on any consideration unique to railroads. Rather, the Court there reasoned that “the running of a business enterprise is not an integral operation in the area of traditional government functions,” *id.* at 685 n.11, *quoting Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 422-24 (1978) (Burger, C.J., concurring), especially where running such an enterprise “has traditionally been a function of private industry, not state or local governments,” 455 U.S. at 686. The Court concluded that part of its opinion as follows:

It is certainly true that some passenger railroads have come under state control in recent years, as have several freight lines, but that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. *Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state.* [*Id.*; second emphasis added]

Only after so concluding did the Court go on, in Part III of the *UTU* opinion, to discuss the railroad-specific factors appellees stress here such as that “[r]ailroads have been subject to comprehensive federal regulation for nearly a century,” *id.* at 687, and that Congress “has determined that a uniform regulatory scheme is necessary to the operation of the national rail system,” *id.* at 688. The Court drew in essence the same lesson in Part III that was drawn in the concluding passage of Part II just quoted:

The State knew of and accepted the federal regulation; moreover, it operated under federal regulation for 13 years without claiming any impairment of its traditional sovereignty. . . . It can thus hardly be maintained that application of the Act to the

State's operation of the Railroad is likely to impair the State's ability to fulfill its role in the Union or to endanger the "separate and independent existence" referred to in *National League of Cities v. Usery*, 426 U.S., at 851." [455 U.S. at 690]

Parts II and III of the *UTU* opinion, then, are independent of each other and establish two *alternative* grounds of decision. Cf. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

Part II announces the first rule of that case: where a State takes over the operation of a business enterprise that has traditionally been a part of the private sector, that enterprise does not become an "integral operation in the area of traditional government functions" immune from federal regulation of the wages and hours of the enterprise's employees. As the Court put it last Term in *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, — U.S. —, 103 S.Ct. 1011, 1014 n.6 (1983), "It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause power when they are engaged in proprietary activities."

Part III of *UTU* announces a second rule: where a State undertakes an activity that has long been subject "to comprehensive federal regulation" and as to which "a uniform regulatory scheme is necessary," the Tenth Amendment does not preclude federal regulation of the wages and hours of the state employees engaged in that activity regardless of whether the activity is deemed proprietary or non-proprietary.

It is the first of these rules that is controlling here as we demonstrated at length in our opening brief.¹

¹ Appellees' response to our argument that stated-owned transit operations are "business enterprises" is that such operations are not "profit-making." APTA Br. at 18; see SAMTA Br. at 27-28 n.24. But as we explained in our opening brief (at 15), the same was true of the railroad in *UTU*, which was deemed by the Court to be a "business enterprise." See also *Helvering v. Leland Powers*, 293

B. Underlying appellees' attempt to expand *National League of Cities* and to constrict *UTU* is the thesis that as the States take over private-sector business enterprises, their Tenth Amendment immunity from federal regulation should continually expand and Congress' commerce power continually contract. As we noted in our opening brief (at 23-24), that view of the Tenth Amendment would turn the Amendment into an economic incentive for the public sector to assume functions previously performed by the private sector. Under appellees' theory, so long as a service is provided through the private sector, that service is subject to federal regulation—regulation that in order to further other social values may (and, as the *FLSA* illustrates, often does) raise the costs of delivering that service; if, however, the States elect to provide that very service themselves, federal regulatory power ceases, permitting the States to offer the service at a lower cost.

We know of no evidence that the founding fathers sought in this way to further, or even to ease, the transformation of a private enterprise system for the provision of goods and services (like the transportation of the individual citizen on his private rounds from one place to another) to a state enterprise system. Certainly appellees offer no reasoned defense of their thesis that by reason of some natural law (akin to that currently held on the evolution of the universe) the Tenth Amendment is ever-

U.S. 214 (1934) (concluding that the State's operation of a transit system was a "business enterprise" even though the system had lost sizeable sums of money and received state subsidies for many years); *United States v. California*, 297 U.S. 175, 183 (1936) (sustaining federal power to regulate a state-owned railroad and expressly rejecting the argument that "as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceedings of operation for harbor improvement, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act").

expanding. Given the anomalies created by appellees' reading of the Tenth Amendment, their silence on the principle that justifies such a reading is pregnant with significance.

C. Appellees also place great stress on the importance of state-owned transit systems "to the life of any community," arguing that public transportation "is at least as important to the health and survival of a community as are the functions expressly protected in *National League of Cities*." APTA Br. at 16-17. But the commuter railroad at issue in *UTU* was no less important to New York than SAMTA is to San Antonio,² yet the Court concluded that the Long Island Rail Road is not an integral operation in an area of traditional governmental functions.

Indeed, were the rule otherwise, the Tenth Amendment would know no bounds. As this Court recognized in *Reeves Inc. v. Stake*, 447 U.S. 429 (1980), there is virtually no limit to the type of activities that "[a] State may deem . . . essential to its economy," *id.* at 442-43 n.16; even a state-run cement plant may "today be deemed indispensable," *id.* Thus, appellees's assertions of mass transit's importance do not justify clothing state-owned transit systems with the Tenth Amendment immunity that *National League of Cities* affords only to "integral operations in areas of traditional governmental functions."

D. Even if it would otherwise be appropriate to conclude that the States in entering a field previously occupied by private business enterprises acquire a Tenth-

² As APTA stated in its *amicus curiae* brief in *UTU* (at 6):

The primary and almost exclusive activity of the LIRR is provision of local public commuter transit service, a service that today is an activity typical of the services state and local governments have provided their citizens. *It is as essential and integral to the government's public responsibility in the community it serves as are [the activities considered in National League of Cities].* [Emphasis added.]

Amendment immunity from federal regulation, that conclusion is altogether inappropriate with respect to mass transit because of the federal government's catalytic role in the States' entry into this field. Appellees attempt to dismiss the enactment and funding of the Urban Mass Transit Act in two ways, but those attempts do not have sufficient intellectual force to banish UMTA from this case.

Appellees first note that the federal government grants "substantial federal assistance" to the States to fund other activities as to which *National League of Cities* precludes federal regulation. SAMTA Br. at 43-44; APTA Br. at 39-40 n.61. But our point here has nothing to do with the mere fact of federal assistance to mass transit (although the percentage of such assistance is significantly higher for transit than for the other activities to which appellees point, see Secretary of Labor ("Sec'y") Br. at 34-35). Rather, what is critical is that when UMTA was enacted state-operated mass transit was rare and there was a recognized need for government at some level to enter the mass-transit field.³

The federal government could have responded to that need by itself acquiring and operating mass-transit systems; had this been done federal regulatory power would have been unlimited. (In the railroad industry the fed-

³ SAMTA attempts to minimize UMTA's effect by relying on the facts that circa 1965, over 50% of all transit riders patronized public transit and over 56% of transit employees worked for public transit systems. SAMTA Br. at 28. But those data are misleading, for most of the public transit riders and employees were accounted for by a few large cities such as New York; as of 1965 outside of the largest cities, state-owned transit operations were almost unheard of. See Hearings Before the Committee on Banking and Currency of the House of Representatives, 88th Cong., 1st Sess. at 313 (1963) (statement of George Anderson, Executive Vice President, American Transit Association); Lyle C. Fitch and Associates, *Urban Transportation and Public Policy* at 261 (1964). See also our opening brief at 15-16.

eral government in fact followed that course.⁴) Instead, Congress chose through UMTA to enter into cooperative endeavors with the States, recognizing the important federal interest in mass transit. See Sec'y Br. at 26-34. As a result, to quote again the Third Circuit's words in *Kramer v. New Castle Transit Authority*, 677 F.2d 308, 310 (3d Cir. 1982), *cert. denied*, — U.S. —:

—:

The tradition that has evolved encompasses not only state involvement in local mass transportation but also an important federal role in the matter. The Authority cannot recast this development as one in which the states took over transit services on their own while the federal government only provided *post hoc* financial assistance. . . . There is . . . no tradition of the states qua states providing mass transportation.^[5]

⁴ See Rail Passenger Service Act, 45 U.S.C. §§ 501 *et seq.*

⁵ We hasten to add that contrary to the assertion of appellees, it is *not* necessary to our position to conclude that "state and local governments provide transit services because federal aid enticed them into doing so" (APTA Br. at 36-37) or even that federal aid "hastened the public takeover of transit systems" (SAMTA Br. at 41). We do not think it necessary or profitable to speculate about the States' real motive or true purpose in entering the transit field, or about what would have occurred in the absence of UMTA. It is enough that the States chose to enter the mass transit field hand-in-hand with the federal government in cooperative endeavors.

Because this is so, § 13(c) of UMTA, 49 U.S.C. § 1609(c), is significant, for as a result of that section the labor relations of public transit systems have been subject to some federal regulation since the States entered the transit field; indeed Congress enacted § 13(c) precisely because of the importance it attached to "protecting workers affected as a result of adjustments in an industry carried out under the aegis of Federal law." S. Rep. 82, 88th Cong., 1st Sess. 12 (1963). See also our opening brief at 17-18.

SAMTA attempts to write off § 13(c) by ignoring that part of the section that requires grantees to "continu[e] collective bargaining rights." See SAMTA Br. at 41-42. APTA at least recognizes that requirement but suggests that requiring collective bargaining is "less intrusive" than "imposing specific federal conditions such as

Appellees argue alternatively that, in relying on UMTA, we are "really making a Spending Power argument in a Commerce Clause case." SAMTA Br. at 42-43. Appellees attribute to us "the onerous notion that by accepting federal funds to assume a function necessary to the life of the community, state and local governments . . . unleashed boundless federal Commerce Clause authority over an integral activity otherwise entitled to Tenth Amendment protection." APTA Br. at 39.

This entire argument begs the critical question. The issue here is whether, in operating transit systems, the States are "entitled to Tenth Amendment protection" *in the first instance*. Appellees' Spending Clause argument assumes the answer to that question, and proves only that if an affirmative answer is assumed UMTA does not require the States to surrender that immunity. But our point is that because UMTA was enacted before the States were significantly involved in the mass transit field and because state entry has been accomplished through a joint program with the federal government subject to federal regulation, transit operations are not a traditional state function and the States never acquired a Tenth Amendment immunity with respect to those operations.

Thus, we are not suggesting "that Congress, by providing UMTA funds through the exercise of its Spending Power, has implicitly eliminated the Tenth Amendment

the FLSA requirements." APTA Br. at 41. APTA's suggestion is startling—we had not thought any employer would view an obligation to bargain collectively with its employees to be "less intrusive" than a requirement to pay minimum wages. (The history of collective bargaining in mass transit may well explain why "the wages of transit operators have exceeded that of other full-time city employees." National League of Cities Br. at 7.)

In any event APTA's claim concerning the relative burdens of § 13(c) and the FLSA is irrelevant since § 13(c) at least establishes that there is no tradition of state immunity from federal regulation with respect to the employment conditions of public transit employees.

limitation on its Commerce Clause powers," APTA Br. at 43, nor are we arguing that "receipt of [UMTA] funds can[] abrogate the Tenth Amendment rights of [recipients]," SAMTA Br. at 41. Rather, our submission is that because of the federal-state partnership that has been the hallmark of public mass transit, the federal government never lost its Commerce Clause power to regulate the wages and hours of employees engaged in the business of delivering mass transit services.

E. A recurring theme in appellees' briefs is that our position cannot be squared with the guidance afforded by *National League of Cities* as to which state activities are "integral operations in areas of traditional governmental functions." In that case, the Court indicated that "such areas as fire prevention, police protection, sanitation, public health, and parks and recreation" meet that test because "[t]hese activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. And appellees suggest that state operation of a mass transit system is more similar to "fire prevention, police protection, sanitation" and the like than to state operation of a commuter railroad.⁶

⁶ For present purposes, we indulge appellees' supposition that to the extent the *National League of Cities* "non-exhaustive" list of traditional and integral state functions clashes with the principles refined from the *National League of Cities* opinion in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) and *UTU*, the former rather than the latter prevail. We do so because, as we show in the text, even that unreasoned approach to the reading of this Court's cases and the proper means of perfecting constitutional law does not lead to the result appellees seek. But our response would be incomplete if we did not reemphasize the point made in our opening brief (at pp. 22-25) that the values embodied in the Tenth Amendment are implicated to only a limited degree by federal regulation of the States as service-providers (as distinguished from the States as lawmakers and law enforcers). That being so, it is our position that the *National League of Cities*' list not only fails to provide a sound foundation for resolving the instant case but should also, on an appropriate occasion, be reexamined.

From a functional standpoint it is obvious that mass transit systems provide a service that is quite different from those listed in *National League of Cities* and is virtually identical to the commuter railroad at issue in *UTU*. Indeed the only functional difference between mass transit and commuter railroads is the type of vehicle used to perform the service. In this regard, we agree with what APTA told this Court in its *amicus curiae* brief in *UTU* (at 6): "[T]he service performed is what is of constitutional significance, not the means selected by the state to perform that service."

Moreover, even if the functional similarities between mass transit and commuter railroads could somehow be set aside in determining whether there is federal regulatory power, mass transit still would be distinguishable from the services listed in *National League of Cities*. First, all of the services listed in *National League of Cities* are services the States have "traditionally afforded their citizens," as the Court twice noted. 426 U.S. at 851, 855. In contrast, state-owned mass transit systems are a recent phenomenon.⁷ Second, unlike mass transit, the States had provided the services listed in *National League of Cities* long before the dawn of federal assistance and the States had, therefore, long acted free from federal regulation. While appellees attempt to find exceptions to this general rule, their efforts are unavailing and, giving appellees the benefit of every doubt, their few meager examples do not detract from the validity of the generalization.⁸ Third, again in contrast to

⁷ Appellees' reliance on the history of state regulation of transit operations, see SAMTA Br. at 24-26, and of state responsibility for road construction, SAMTA Br. at 27; APTA Br. at 23, is misplaced. While transit systems, like a number of other private enterprises, have been regulated as "public utilities," and road building has been a public responsibility, transit systems were historically operated as *private business enterprises*. The Secretary of Labor develops this point in his opening brief (at 20-24) and appellees have made no reasoned response.

⁸ For example, SAMTA asserts (Br. at 44) that "An activity specifically exempted in *National League*, which was essentially

mass transit, the services listed in *National League of Cities* are provided by the States to all citizens regardless of their ability to pay; thus there is, in the main, no charge for public schooling, fire prevention, police protection, or sanitation.⁹ Fourth, and finally, the States

created as a result of federal funding, is solid waste management (sanitation).” But “solid waste management” is simply a new form of an old activity—waste disposal—which has been a function of government as a result of the fact that waste collection is largely a governmental function; in earlier years, governments owned dumps, incinerators and the like for waste disposal. See E. Savas, *The Organization and Efficiency of Solid Waste Collection*, at 18-22, 35 (1977); American Public Works Association, *History of Public Works in the United States, 1776-1976*, at 433-39, 441, 447-48 (1976).

SAMTA also implies that the Hill-Burton Act played the same role in the development of public hospitals that UMTA did in the development of public transit. But long before Hill-Burton was passed there was a well-established tradition of publicly operated hospitals; indeed the oldest hospital in the United States is Philadelphia General Hospital which was opened in 1732, and by 1900 it was commonplace for a State, county, or city to operate a hospital. J. Hamilton, *Patterns of Hospitals Ownership and Control*, 68-69, 75-76, 79 (1961). And while it is true, as SAMTA notes, that Hill-Burton facilitated the growth of county hospitals, the very source that SAMTA relies on to establish that fact also establishes that Hill-Burton did not have that effect with respect to state or city hospitals. J. Hamilton, *supra*, at 69, 83.

⁹ Appellees correctly note that some of the state services discussed in *National League of Cities* generate some revenue through charges. SAMTA Br. at 40; APTA Br. at 19-20. But that does not detract from the reality that the services in question are provided by the States to all citizens regardless of their ability to pay. For example, “every . . . state provides its citizens with free elementary and secondary schooling,” *Mueller v. Allen*, — U.S. —, 103 S.Ct. 3062, 3064 (1983); the education charges to which APTA refers are for specialized services such as summer school or driver education, *see id.* at 3065 n.2. Similarly, the public park charges on which SAMTA relies are also for specialized services such as use of campgrounds, *see* U.S. Dept. of the Interior, *Fees and Charges Handbook* at 9, 29 (1982); indeed, the very reason that governments have created and maintained parks is to provide “for the leisure of the people,” and not just the affluent. See American Public Works Association, *supra*, n.8 at 555. And while public universities and public hos-

in providing the services listed in *National League of Cities* generally do not compete with profit-making businesses; in contrast, mass transit competes directly with forms of private transportation.

II. CONGRESS WAS NOT REQUIRED TO AMEND THE FLSA AFTER *NATIONAL LEAGUE OF CITIES* TO PRESERVE THAT ACT'S COVERAGE OF STATE-OWNED TRANSIT SYSTEMS.

Appellees argue that because *National League of Cities* held that the FLSA may not constitutionally be applied to some categories of public employees, a "subsequent amendment" is required before the FLSA may be applied to any group of public employees. Appellees advance two arguments in support of this proposition; neither can withstand analysis.

A. Appellees first suggest that "it is not probable that Congress would have intended to enact a law only directed at a small class of public employees if it could no longer carry out its intent to cover all state and local employees." APTA Br. at 46; see SAMTA Br. at 49. What this Court said last Term in response to a similar argument in *INS v. Chadha*, — U.S. —, 103 S. Ct. 2764, 2774 (1983), is equally applicable here: "we need not embark on that elusive inquiry since Congress itself has provided the answer to the question of severability. . . ." Section 219 of the FLSA expressly states that "If . . . the application of [any] provision to any person or circumstance is held invalid . . . the application of such provision to other persons or circumstances shall not be affected thereby." 29 U.S.C. § 219. This section thus refutes appellees' understanding of Congress' intent.¹⁰

hospitals generally charge user fees for their basic services, those charges are waived for those who cannot afford to pay. See Comm'n. on Financing of Hospital Care, *Factors Affecting the Costs of Hospital Care* at 6-8 (1954); Carnegie Foundation for the Advancement of Teaching, *The States and Higher Education*, 30, 46 (1976).

¹⁰ It is noteworthy that on appellees' theory, *National League of Cities* should have culminated in a decree declaring the 1974 amendments to the FLSA invalid *in toto* and precluding their

Even apart from the severability clause, appellees' argument makes no sense. Appellees offer no reason to believe that Congress would view the application of the FLSA in the public sector to be an all or nothing proposition and would not wish to cover any public employee if every such employee could not be covered. In the private sector, the reverse always has been true: Congress has deliberately applied the FLSA to some categories of employees but not others.

There is, moreover, a specific indication that Congress would choose to apply the FLSA to state transit employees even though that Act cannot be applied to other specific categories of state employees. As previously noted, in enacting UMTA in 1964 Congress took special care to afford certain protections to transit workers. *See* pp. 7-8 n.5, *supra*. Moreover, the FLSA was amended to cover public transit employees in 1966, *see* P.L. 89-601, 80 Stat. 931, eight years *before* Congress amended the Act to apply to all public employees. The 1966 Congress so acted because public transit systems "are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose" and because Congress therefore concluded that "[f]ailure to cover . . . these enterprises will result in ~~the~~ failure to implement one of the basic purposes of the Act, the elimination of conditions which 'constitute an unfair method of competition in commerce.'" H.R. Rep. 1366, 89th Cong. 2d Sess. 16-17

application to any category of public employees. That is not, in fact, what occurred: this Court did not mandate such a decree, and on remand the district court entered an order approving an amendment to the Secretary's FLSA regulations which expressly contemplated that the FLSA would continue to be applied to public employees performing "non-traditional" functions. *See National League of Cities v. Marshall*, 429 F. Supp. 703 (D.D.C. 1977); 42 Fed. Reg. 32253 (June 24, 1977). The Secretary subsequently further amended that regulation to specify certain functions, including mass transit, as being "non-traditional," 29 CFR § 775.3(b) (1983), and it is the validity of that second amendment, insofar as it applies to public transit, that is at issue here.

(1966); S. Rep. 1487, 89th Cong. 2d Sess. 8 (1966). And the fact that, as a result of *National League of Cities*, the FLSA cannot be applied to all public employees in no way detracts from Congress' desire to assure that at least in the transit industry all workers—whether publicly or privately employed—are covered by the Act. Thus even apart from the severability clause previously quoted, there is every reason to believe that Congress would desire the FLSA to cover public transit employees even if the Act could not cover any other category of public employee.

B. Appellee SAMTA—although, significantly, *not* appellee APTA—advances a second argument: SAMTA contends that even if application of the FLSA to transit employees would best accord with congressional intent, such application is nonetheless precluded because that would require “add[ing] words of limitation (codifying the Court’s ‘traditional government function’ holding) where none presently exist.” SAMTA Br. at 47. According to SAMTA, courts are required to frustrate Congress’ intent if furthering that intent would require “a court to add words to a statute.” *Id.* SAMTA’s argument is doubly flawed.

(1) Even if the rule of severability were as SAMTA contends—and it is not—SAMTA would not be helped. For if the 1974 amendments to the FLSA which extended the coverage of that Act to all public employees were deemed invalid *in toto*, the situation would then revert to that which existed prior to 1974.¹¹ At that time the FLSA applied to public transit operations by virtue of discrete provisions of that Act.¹² Specifically, under the 1961 and

¹¹ Cf. *Frost v. Corporation Comm’n*, 278 U.S. 515, 525-27 & cases cited (1929).

¹² The statement in text requires one qualification. Under the 1966 Act, transit operators were not covered by the overtime provisions of the FLSA. P.L. 89-601, § 206. A discrete provision in the 1974 amendments phased out that special exemption. P.L. 93-

1966 amendments to the FLSA, the term "employer" was defined to include the State with respect to certain specified categories of employees, including transit employees, P.L. 89-601, § 102(b); the term "enterprise engaged in commerce" was defined to include a local transit enterprise with gross sales no less than \$1,000,000, P.L. 87-30, § 2(c); and the term "activities performed for a business purpose" was defined to include activities in connection with a transit operation if "the rates and services of such [transit operation] are subject to regulation by a State or local agency," P.L. 89-601 § 102(a)(2). Thus, contrary to SAMTA's argument, even if *National League of Cities* precluded all application of the provisions at issue in that case, it still would not be necessary to add even a single comma to the FLSA in order for that Act to cover state transit employees.¹³

259, § 21(b)(1)(3), 88 Stat. 68. That provision was not involved in and is not affected by *National League of Cities*.

¹³ In an attempt to avoid this conclusion, SAMTA contends that the 1966 amendments, which defined "activities performed for a business purpose" to include transit operations if "the rates and services of such [operations] are subject to regulation by a State or local agency," meant that "only public systems that are regulated by some other state or local agency are covered" and not those transit systems "that regulated their own rates and service." SAMTA Br. at 49 n.41. On this basis it is contended that SAMTA was not covered by the 1966 amendments and would not be covered if the 1974 amendments were deemed invalid *in toto*.

The legislative history of the 1966 amendments refutes SAMTA's argument. That history shows that Congress' intent was to eliminate the "distinction between a public or private local transit system," S. Rep. 1487, *supra*, at 26-27, because "[f]ailure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the act, the elimination of conditions which 'constitute an unfair method of competition in commerce,' " *see* p. 14, *supra*.

SAMTA bases its argument on written testimony by Carmack Cochran on behalf of the American Transit Association in 1971 with respect to a bill which would have extended the FLSA to all state employees (as the 1974 amendments eventually did). All that

(2) In any event, SAMTA is wrong in contending that the courts are precluded from reading words of limitation into a statute which is unconstitutional by virtue of its breadth and which Congress would want to apply more narrowly. In any severability case "[t]he question is one of interpretation and of legislative intent." *William v. Standard Oil Co.*, 278 U.S. 235, 241 (1929). "'[I]t is not an adequate discharge of [that] duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *U.S. v. Hutcheson*, 312 U.S. 219, 325 (1941), quoting *Johnson v. United States*, 163 F. 30, 32 (Holmes, J.). This is true in a severability case even when "the necessary remedial operation . . . is more analogous to a graft than amputation," *Welsh v. United States*, 398 U.S. 333, 364 (1970) (Harlan, J. concurring). See also *Heckler v. Mathews*, — U.S. —, 52 L.W. 4333, 4336 & n.1 (March 5, 1984).

This Court has not hesitated in other cases to engraft words onto a law it has found to be unconstitutional in order to cure the constitutional defect in the manner most consistent with Congress' intent. *E.g.*, *Califano v. Westcott*, 443 U.S. 76 (1979). And because application of the FLSA to public transit employees would best further Congress' will, such application would be proper even if it

Cochran said in his testimony is that the proposed FLSA amendment "would apply to public transit systems whether or not their rates and services are subject to regulation by a state or local agency," *Hearings on H.R. 7130 Before the General Subcommittee on Labor of the House of Representatives Committee on Education and Labor*, 92nd Cong., 1st Sess. 206 (1971). Cochran did not suggest, as SAMTA now does, that absent the amendment the FLSA applied only to public transit systems that were externally regulated. And when the House Committee reported the proposed amendments, that Committee stated that "public employees employed in . . . local transit operations" were already covered by the FLSA by virtue of "the 1966 amendments". H.R. Rep. 92-672, 92nd Cong., 1st Sess. 6 (1971).

required the Court to read words of limitation into the 1974 amendments to the FLSA.¹⁴

CONCLUSION

For the above stated reasons the decision below should be reversed.

Respectfully submitted,

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¹⁴ *United States v. Reese*, 92 U.S. 214 (1876), on which SAMTA relies, is not to the contrary. Although there is language in *Reese* which could be read to adopt a formalistic rule precluding engrafting words onto a law under any circumstance, this Court subsequently has understood *Reese* to rest on a determination as to the congressional intent underlying the particular statute at issue in that case and thus to be "but an exercise of judicial interpretation." *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28, 42 (1900). Furthermore, *Reese* involved a penal statute and the Court was concerned about the vagueness problem that could result if words of limitation were engrafted onto the law:

It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. [92 U.S. at 221]

See also *Baldwin v. Franks*, 120 U.S. 678, 688 (1887).

Hill v. Wallace, 259 U.S. 44 (1922), on which SAMTA also relies, is likewise distinguishable. The Court's reasoning in *Hill* consists entirely of quotations from *Reese*, words which, as just noted, the Court has understood to be "an exercise of judicial interpretation." And the nonseverability holding of *Hill* undeniably follows Congress' intent with respect to the law at issue there.

Nos. 82-1913 and 82-1951

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FILED
MAR 12 1984
ALEXANDER L. STEVAS.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
ET AL.

ON APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE SECRETARY OF LABOR

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REPLY BRIEF FOR THE SECRETARY OF LABOR

The question in this case is whether provisions of the 1966 and 1974 amendments to the Fair Labor Standards Act (FLSA) that progressively extended minimum wage and overtime wage protection to employees of publicly owned mass transit systems are a permissible

exercise of Congress's authority to legislate under the Commerce Clause. This question was not resolved by the Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), because the statutory provisions that were at issue there are distinct from those now before the Court. See Gov't Br. 2-5.

In our opening brief we have explained that operation of a transit system is not a "traditional governmental function[]" within the meaning of *National League of Cities*, 426 U.S. at 852, and that application of the FLSA to transit systems poses no threat to the separate and independent existence of the states. Appellees' counter-arguments generally were anticipated in our opening brief and, for the most part, require no reply. Several points do warrant further comment, however.

A. 1. *National League of Cities* declared the Tenth Amendment principle that the National Government may not "'devour the essentials of state sovereignty'" (426 U.S. at 855 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting))). Thus Congress may not apply its vast power to regulate commerce directly upon activities of the states in a "fashion that impairs the States' integrity or their ability to function effectively in a federal system.'" *National League of Cities*, 426 U.S. at 843 (quoting *Fry v. United States*, 421 U.S. 542, 6547 n.7 (1975))).

In this and in other areas of state immunity from federal legislation, however, the Court has been sensitive to the expanding "activity of state governments into new fields * * * [undertaking] the performance of functions not known to the states when the constitution was adopted" (*National League of Cities*, 426 U.S. at 870 n.10 (Brennan, J., dissenting)) and the tendency of state and local enterprises to make economic choices af-

fecting interstate commerce restricted only by parochial interests. See *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 422-424 (1978) (Opinion of Burger, C.J.). Because a restraint on national power erected to prevent the destruction of state sovereignty might become a vehicle for the erosion of national authority and the integrity of federal power, the Court has been careful to limit areas of immunity to circumstances where federal control might "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (*National League of Cities*, 426 U.S. at 852). The Court subsequently explained that its repeated "emphasis on traditional government functions and traditional aspects of state sovereignty" was "meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 686-687 (1982) (quoting *National League of Cities*, 426 U.S. at 851).

The Court has refused to recognize any "sacred province of state autonomy," but has carefully limited the states' immunity to "core state functions" (*EEOC v. Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 9). Rejecting "pernicious abstractions" (*Graves v. New York*, 306 U.S. 466, 489-490 (1939) (Frankfurter, J., concurring)), the Court has delimited the sphere of Tenth Amendment immunity from Commerce Clause legislation to what is actually necessary to preserve the separate and independent existence of the states (*EEOC v. Wyoming*, slip op. 9).

Appellees suggest that Tenth Amendment immunity must be extended to publicly operated transit enter-

prises simply because they are publicly operated and because the services provided are needed by the persons who use them. See APTA Br. 9, 16; SAMTA Br. 33-34. But this submission represents a radical departure from the Court's prior decisions. The importance of transit or any other service to those who use it simply does not provide a measure of the impact *upon state sovereignty* of federal legislation applying uniform wage standards to enterprises in the public and private sector. In today's society, many goods and services are "essential" to public welfare. Yet a decision by the states to take over the provision of food, clothing or the channels of communication to their citizens plainly could not justify abrogation of the authority of Congress to legislate, in the national interest, regarding these vital components in the stream of commerce.

2. Fifty years ago, in *Helvering v. Powers*, 293 U.S. 214 (1934), this Court unanimously held that the municipal operation of a street railway, "[w]hile * * * for the public benefit, * * * is still a particular business enterprise" (*id.* at 223) and not a field of activity which required protection from federal taxation in order to protect the independence of state government. The operation of such an enterprise was described by Chief Justice Hughes as "distinct" from "usual governmental functions" (*id.* at 227). Appellees brush *Powers* aside as an antique, conveniently overlooking that they are trying to prove that municipal transit systems are "traditional" governmental functions. *Powers* establishes at minimum that more than a century into this Nation's existence no member of this Court viewed a public transit system as even a "governmental," much less a "traditional" governmental, function.

Just a term ago, in a decision that appellees are unable to characterize as out-of-date, this Court again

unanimously remained unconvinced that a publicly owned and operated commuter railroad is a traditional government function. *Long Island R.R.*, 455 U.S. at 686. The holding of *Long Island R.R.* leaves little room for appellees' argument that operation of a transit system free of the requirements of uniform federal legislation regulating commerce is essential to preservation of state sovereignty. The Court there rejected a virtually identical claim, stating:

"[T]here [is] certainly no question that a State's operation of a common carrier, even without profit and as a 'public function,' would be subject to federal regulation under the Commerce Clause...."

455 U.S. at 685 n.11 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 422 (1978) (opinion of Burger, C.J.)). Appellees struggle to find factual distinctions between a commuter railroad and a transit system (see page 12 & note 7, *infra*). But even if these technical distinctions had substance, they simply could not justify adopting disparate rules of constitutional law for commuter railroads and other transit operations; the dispositive fact is that neither commuter railroads nor other transit operations "provide[] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (*National League of Cities*, 426 U.S. at 855).¹

¹ APTA stated in 1981 that commuter railroads "are rapidly being merged into the transit industry" and without exception "are now either publicly owned or receive financial support from public agencies." *Transit Fact Book 1981*, at 18. And in its amicus curiae brief in *Long Island R.R.*, APTA remarked (at 21) that "this Court should not evaluate commuter trains in isolation, but rather it should consider them as an integral part of local urban mass transportation systems throughout the United

B. 1. The government's opening brief canvassed the numerous attributes of publicly operated transit systems that set them apart from the "traditional governmental functions" held to be immune from the operation of the Fair Labor Standards Act in *National League of Cities*. These include: the historic predominance of the private sector in providing local transit services, the infant status of the public sector of the industry, and the continuing role of private carriers (Gov't Br. 16-24); the critical role of federal financial aid in making possible the acquisition and operation of transit services by local governments in recent years (Gov't Br. 26-38); the existence of substantial federal regulatory legislation governing labor relations and terms of employment in the local transit industry that was in place by the time significant numbers of local governments began to acquire transit systems (Gov't Br. 39-43); the absence of any untoward impact upon state prerogatives resulting from application of the FLSA to public transit employment (Gov't Br. 43-46); and the potent federal interest

States." Respondent (see Br. 7, 18-24 & nn.22-23) and the other amici supporting it in *Long Island R.R.* made the same point (see Nat'l League of Cities Br. 10-12; Nat'l Inst. of Mun. Law Officers Br. 3, 10-17). Of course, as APTA observes (Br. 14 n.15, 26 n.38), we pointed out in *Long Island R.R.* that the question presented in this case did not have to be resolved there, and that differences existed between the role of local government in commuter rail operations and in other forms of transit. But nothing in our earlier brief suggests that mass transit operations meet the test for Tenth Amendment immunity. Moreover, it is difficult to understand how APTA can maintain (Br. 15-16) that transit services are an inseparable part of a city's larger transportation network, yet that different constitutional rules should apply to a commuter railroad and bus or subway operations conducted by the very same governmental entity. (The Long Island Railroad is operated by New York's Metropolitan Transportation Authority, which also operates New York City's buses and subways. See Resp. Br. 1-2, *Long Island R.R.*)

in preventing unfair competition in commerce, which, Congress determined, required FLSA coverage of public transit employment (Gov't Br. 46-48). In the aggregate these factors show that the transit provisions of the FLSA pose no threat to state sovereignty.

Appellees' response, by and large, is to suggest one example or another of a service, claimed to be immune from operation of the FLSA under the teaching of *National League of Cities*, that allegedly shares one of the special attributes of the local transit industry.² The particular analogies drawn by appellees generally are dubious, at best. A more significant and revealing consideration, we submit, is that appellees do not—and cannot—identify any state or local governmental activity recognized to be within the protected sphere delineated in *National League of Cities* that possesses anything like the combination of distinguishing attributes that set the public sector of the local transit industry apart.

For example, appellees observe (APTA Br. 25 n.33; SAMTA Br. 35-37) that hospitals and schools, like transit, currently are found in the private as well as the public sector.³ But appellees forget that the public sec-

² See generally SAMTA Br. 33-40, 43-44; APTA Br. 25 n.33, 33-34, 38 n.57, 39-40 & n.61.

³ We note that appellees utilize incommensurable statistics in making these comparisons, highlighting for instance (APTA Br. 25 n.33) the proportion of *schools* that are privately operated. But the data that we have presented (see Gov't Br. 16-18) reflect the proportion of American *communities* that have assumed responsibility for local transit service. Appellees have not identified a single community in the United States that relies exclusively on private schools. The states' and municipalities' perception that education is a service they have a sovereign duty to provide—irrespective of the availability of private sector alternatives—reflects that education, unlike transit, is among the "functions * * * which governments are created to

tor in these fields was well established before the enactment of the FLSA—and long before its extension to cover public employment. And there is no evidence whatsoever that public participation in these fields resulted from governmental takeovers of private enterprises previously subject to the FLSA, much less that such a transformation was materially assisted by substantial federal funding.

Similarly, appellees adduce other examples of state or local governmental activities that have been substantially assisted with federal funds (APTA Br. 38 n.57; SAMTA Br. 43), such as construction of wastewater treatment plants.⁴ But in none of these examples was a service traditionally performed by the private sector subject to the FLSA converted to public operation, thereby eroding federal constitutional authority. In other instances cited by appellees, such as the education of handicapped children (see APTA Br. 38 n.57), federal funds have encouraged or made possible the augmentation of existing services or provision of public services to an expanded client population within an existing area of local governmental responsibility. Such enhancement or expansion of existing services is hardly comparable to the dramatic conversion of the entire field of local transit service from the private sector to

provide" (*National League of Cities*, 426 U.S. at 851). Cf. *Plyler v. Doe*, 457 U.S. 202, 221-223 (1982).

⁴ If, as appellees assert, these plants simply would not exist but for the availability of federal funding, it might well be entirely proper for Congress to require FLSA protection for the employees of such plants. Contrary to appellees' assumption, the mere characterization of "sanitation" as a traditional government function in *National League of Cities*, 426 U.S. at 851, does not resolve this issue. Cf. 29 C.F.R. 775.3(b) (FLSA may be applied to production and sale of organic fertilizer as a by-product of sewage treatment; see Gov't Br. 6).

the public sector that occurred in many communities in recent years. Unlike the former, the latter serves—if the decision below should stand—to repeal the established federal wage and hour protections applicable in an entire industry.

The wholly artificial exercise of examining in isolation particular facets of the complex of attributes that distinguish the public sector of the transit industry from the protected “traditional governmental functions” identified in *National League of Cities* cannot assist appellees. The ultimate inquiry required by *National League of Cities* and its progeny is “whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government’s ability to fulfill its role in the Union and endanger its ‘separate and independent existence.’” *Long Island R.R.*, 455 U.S. at 686-687 (quoting *National League of Cities*, 426 U.S. at 851). This heavy burden cannot be met by a showing that transit shares selected attributes of activities previously identified as protected.⁵

⁵ Appellees seek (APTA Br. 12-14; SAMTA Br. 15-17) to foreclose consideration by the Court of whether application of the FLSA to public transit systems unduly intrudes upon the states’ “ability ‘to structure integral operations’” (*Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981) (quoting *National League of Cities*, 426 U.S. at 852)) or whether “the nature of the federal interest advanced” here is “such that it justifies state submission” (*Hodel*, 452 U.S. at 288 n.29). But it would be improper to read *National League of Cities* to prevent examination of any element of the established tests for Tenth Amendment immunity.

The transit provisions of the FLSA amendments of 1966 and 1974 were not before the Court in *National League of Cities*. Moreover, the Court carefully canvassed the effects of the wage and hour requirements as applied to the traditional governmental functions involved in *National League of Cities*. It determined that they entailed “a virtual chain reaction of substantial and almost certainly unintended consequential effects on state

2. a. In their efforts to portray local transit service as a "traditional governmental function," appellees engage in a substantial exercise in historical revisionism (see APTA Br. 23-24; SAMTA Br. 26-28). This is best demonstrated by tracing the course of APTA's own utterances on this subject. As recently as December 1979, contemporaneous with the filing of the complaint in this action, APTA's official public literature proclaimed bluntly: "Public ownership of transit is a recent development." *Transit Fact Book* 55 (1978-1979 ed.). Less than two years later, with this litigation going forward, APTA reversed its assessment 180 degrees, stating, based on the very same data, that "[p]ublic ownership of transit is *not* a recent development" *Transit Fact Book* 1981, at 27 (1981) (emphasis added). Similarly,

decisionmaking" amounting to a "wide-ranging and profound threat to the structure of State governance" (*EEOC v. Wyoming*, No. 81-554 (Mar. 2, 1984), slip op. 13). Only then was the Court able to conclude that the states' ability to set wages for employees performing these particular governmental functions free of the impact of federal law was an integral part of state sovereignty. See 426 U.S. at 845-852. By contrast, we have presented substantial arguments, not answered by appellees, that no such impermissible effect is portended by the distinct statutory provisions at issue here (see Gov't Br. 43-46). And the transit provisions of the FLSA rest upon Congress's determination that application of the FLSA to the public sector of the transit industry is required in order to prevent unfair competition (see Gov't Br. 46-48)—a consideration nowhere addressed in *National League of Cities*.

The presumption of constitutionality that cloaks the 1966 and 1974 transit amendments to the FLSA (see *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)) accordingly cannot be overcome without consideration of all the factors that bear upon the question presented. Indeed, to artificially constrict the range of the Court's inquiry in this case would be inconsistent with the Court's explanation in *National League of Cities* (426 U.S. at 852-853) of its refusal to overrule *Fry v. United States*, 421 U.S. 542 (1975).

while appellees now attempt to minimize the significance of federal financial assistance (APTA Br. 38), APTA acknowledged in 1981 that federal funding for local transit in the 1960's saved transit in "many cities" from "extinction," and that federal aid has since increased "many times." *Transit Fact Book 1981*, at 29-30. Indeed, even today, amici curiae National League of Cities et al. appear to acknowledge (Br. 5-6) that although some public transit systems existed prior to the advent of federal assistance, the major shift of transit service from the private sector to the public sector followed, and was dependent to a critical degree upon, the availability of substantial federal financial assistance. Appellees' effort to characterize the public sector of the local transit industry as an independent creation of state or local government of long standing accordingly should be greeted with skepticism.

b. As an alternative to this effort to recast history, appellees fall back upon the district court's observation (J.S. App. 4a) that transportation-related activities such as road building are historically associated with the public sector (see SAMTA Br. 45-46; see also APTA Br. 15-17, 23). But there is no warrant for treating all transportation-related activities as a single service for purposes of Tenth Amendment analysis. Plainly, that approach was not followed in *Long Island R.R.* (see Gov't Br. 20-21). And *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, No. 81-827 (Feb. 23, 1983), slip op. 3 & n.6, rejects any such indiscriminate approach to the contours of Tenth Amendment immunity.

In any event, appellees' argument is simply factually insupportable. The employees whose eligibility for minimum wage and overtime protection is at issue here are those who operate, service and administer a transit sys-

tem. Such employees are in no respect interchangeable with those engaged in road building or planning a transportation infrastructure. A tradition of state responsibility for road building or maintenance is accordingly no more relevant in determining the availability of Tenth Amendment immunity for transit operating and administrative employees than is private sector performance of the function of manufacturing motor vehicles, which undoubtedly provide the bulk of local transportation.⁶

c. Like the district court (see J.S. App. 5a), in its effort to establish the elements of Tenth Amendment immunity, SAMTA seizes upon (Br. 24-26) state *regulation* of local transit service as a substitute for the absent tradition of state *operation* of transit systems (see also NLC Br. 4-5). We have already explained (see Gov't Br. 21-24) why this reasoning is alien to this Court's Tenth Amendment teaching. SAMTA, however, points (Br. 24) to this Court's observation, in *Long Island R.R.*, at the end of its recitation of the long history of federal regulation of employment rela-

⁶ Appellees' reliance (SAMTA Br. 5-6 n.3, 45-46; APTA Br. 5 n.8, 23) on *Molina-Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982), is misplaced. There the court held, as a matter of statutory interpretation, that the FLSA does not apply to employees of the Puerto Rico Highway Authority whose "work is related to the Authority's road building and maintenance activities" (*id.* at 846). Tenth Amendment principles were invoked only by analogy to guide the court in statutory interpretation (*id.* at 846-847). Although the court observed that the Puerto Rico Highway Authority "*plans to build* a mass transit system" (*id.* at 845; emphasis added), its decision rested upon the individual plaintiff/employees' jobs—in road building and maintenance (*id.* at 846)—and in no respect suggests that *operation* of a transit system should be regarded as a traditional governmental function inseparable from responsibility for road construction. As noted in our opening brief (at 10 n.13), the courts of appeals uniformly have rejected the claim advanced by appellees in this case.

tions in the railroad industry, that "[t]here is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry" (455 U.S. at 688). But the Court's comment, read in context, hardly suggests that the existence of such a tradition would suffice to override the federal interest in application of a uniform regulatory scheme. See also *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. at 289-292 & n.31.⁷ At most this would be one factor that might be considered in balancing the federal and state interests. See *id.* at 288 n.29.

As it happens, however, there is no need to undertake a refined balancing analysis here. As explained in our opening brief (at 39-43), substantial federal regulation affected wages, collective bargaining, and other aspects of labor relations in the private sector of the transit industry by the time the bulk of the recent conversions of transit operation to public ownership occurred.⁸ By contrast, state regulation of private local

⁷ SAMTA generally makes the mistake of treating each of the observations offered to buttress the holding of *Long Island R.R.* that the Railway Labor Act may constitutionally be applied to a state owned commuter railroad as a negative pregnant prescribing a different result if any of the facts of the case were altered (see SAMTA Br. 17-29). But, as the unanimity that attended the Court's decision in *Long Island R.R.* attests, the multiplicity of factors supporting the Court's decision simply reflects that the decision was a relatively clearcut one. Application of the teaching of *Long Island R.R.* requires more than mere mechanical comparison of the facts of the two cases.

⁸ SAMTA suggests (Br. 22-23) that, because the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, applies to certain private sector counterparts to protected functions enumerated in *National League of Cities*, that statute may not be considered in determining whether a state takeover of services previously performed by the private sector impermissibly erodes federal authority. But the problem of erosion of federal

transit operations did not, even by appellees' account (see SAMTA Br. 25-26 & n.20; see also NLC Br. 4-5), extend to any facet of labor relations, much less to wages and overtime.

3. Appellees devote a considerable portion of their argument (APTA Br. 35-45; SAMTA Br. 41-45) to disputing what they mischaracterize as a "Spending Power argument in a Commerce Clause case" (SAMTA Br. 42-43). But the significance to our argument of federal grants to local public transit systems is hardly "elusive" (compare APTA Br. 35-36). It is simply this: to the extent that Tenth Amendment immunity may extend to local governmental functions that are manifestly not "traditional" in the strict historical sense (see Gov't Br. 24-26), it necessarily is pertinent to inquire how the "new" function came to be established in the public sector.

On that question appellees cannot dispute the historical record. Private transit systems in many cities were taken over by local government with substantial federal financial assistance. The representatives of local government told Congress, and Congress found as a fact, that, in many cities, local transit service could not survive without federal financial assistance that made possible public acquisition and improvement of existing private systems. In view of the critical role of federal

authority arises only when a new public sector endeavor is created by conversion of private sector activities. Moreover, contrary to SAMTA's further suggestion, to bar such erosion of federal authority is not to impose a fixed view of state functions inconsistent with *Long Island R.R.* Rather, there is an important distinction between genuinely new state services that may, in some instances, reshape the protected sphere of state activity without vitiating federal sovereignty, and functions taken over from the private sector that were previously subject to federal regulation. See *Long Island R.R.*, 455 U.S. at 686-687.

funding in establishing mass transit in the public sector, it is unrealistic to portray transit as the kind of "core state function" (*EEOC v. Wyoming*, slip op. 9) that cannot be covered by uniform federal legislation establishing fair wage standards without critically endangering the survival of the states as independent entities. See *Long Island R.R.*, 455 U.S. at 686-687; see also *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 815 (1976) (Stevens, J., concurring). Appellees simply cannot have it both ways, stressing the non-"static" aspects of state sovereignty while ignoring the path that led from past to present.⁹

⁹ As we have previously explained (Gov't Br. 24-26), nothing in *Long Island R.R.* should be understood to adopt an ahistorical approach to the scope of state immunity from federal enactments under the Commerce Clause. Indeed, the additional evidence canvassed in that case (455 U.S. at 687-688) was largely historical in nature.

Nor, contrary to SAMTA's suggestion (Br. 31-32), is a different rule required by *Brush v. Commissioner*, 300 U.S. 352, 370-371 (1937). Subsequent decisions in the area of tax immunity make clear that the language cited by SAMTA represented only an interpretation of the applicable Treasury regulation, which adopted an ahistorical standard. See *Helvering v. Gerhardt*, 304 U.S. 405, 422-423 (1938). And in *New York v. United States*, 326 U.S. 572 (1946), a plurality of the Court, speaking through Chief Justice Stone, rejected an ahistorical approach, at least to the extent that it would "accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning" (326 U.S. at 588). At the same time, Justice Frankfurter, joined by Justice Rutledge, condemned an ahistorical standard as "too shifting a basis for determining constitutional power and too tangled in expediency to serve as a dependable legal criterion" (326 U.S. at 580).

The Court has recently recognized the hazards of adopting such shifting rules of law. *First National City Bank v. Banco Para El Comercio Exterior*, No. 81-984 (June 17, 1983), slip op. 22 n.27. In our opening brief we also noted (at 50-51) the burdens that would be imposed upon Congress by judicial ac-

Contrary to appellees' contention (APTA Br. 39; SAMTA Br. 42), nothing in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), suggests that the federal funding that made possible much of the growth of the public sector of transit industry must now be disregarded. *Pennhurst* embodies a rule of statutory construction useful in determining otherwise ambiguous legislative intent, when it is argued that a federal statute enacted under the spending power imposes requirements on states that accept federal funds. Cf. *EEOC v. Wyoming*, slip op. 16 n.18. Here, of course, there is no question but that Congress intended to extend the FLSA to publicly operated transit systems. The only question presented is whether Congress exceeded its constitutional power in doing so, a question as to which *Pennhurst* has no bearing. Federal funding is relevant to the constitutional question because it is critical to assessing the nature and significance of recent growth of the public sector of the transit industry. Because we do not contend that compliance with the FLSA was a requirement imposed upon the states by the Urban Mass Transportation Act of 1964 (UMT Act), and because the authority of Con-

ceptance of a formless and ahistorical standard for Tenth Amendment immunity. We explained that our constitutional regime assigns to Congress both the competence and the primary responsibility for making adjustments in federal legislation to reflect altered social or economic circumstances that affect the exercise of federal commerce power. It is sheer sophistry to respond, as APTA does (Br. 32 n.49), that the public transit provisions of the FLSA became unconstitutional on the date *National League of Cities* was decided. Undoubtedly that decision marked a significant departure in this Court's Tenth Amendment jurisprudence. But APTA nowhere takes issue with our observation (Br. 49) that the transit provisions of the FLSA were valid when enacted, even under the law as established in *National League of Cities*.

gress to enact the FLSA rests on the Commerce Clause, the rule of statutory construction reflected in *Pennhurst* has no application here.

Appellees' reliance (APTA Br. 41; SAMTA Br. 41) on *Jackson Transit Authority v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), is also misplaced. The issue in that case was whether Section 13(c) of the UMT Act, 49 U.S.C. 1609(c), creates a federal cause of action to enforce an agreement between transit labor and management, entry into which was contemplated by the federal statute. Because we do not rely in this case on the legislative effect of Section 13(c) or any other provision of the UMT Act, the Court's comment in *Jackson Transit*, 457 U.S. at 27, that the UMT Act did not create a body of federal transit labor law is likewise irrelevant.

4. APTA argues (Br. 20-21; see also NLC Br. 9-10) that, contrary to Congress's considered judgment (see Gov't Br. 46), application of the FLSA to transit operating employees would cause certain poorly defined special hardships for public transit systems because of work scheduling practices common in the industry. Defiance to the legislative judgment is particularly appropriate in this instance. Appellees have not shown any flaw in Congress's determinations that overtime pay comparable to that required by the FLSA was generally required by collective bargaining agreements in the public transit industry and that any special problems of application could be resolved through collective bargaining or in the administrative process (see H.R. Rep. 93-913, 93d Cong., 2d Sess. 30-31 (1974)).

In sum, appellees have wholly failed to demonstrate concrete burdens upon their sovereign prerogatives that would flow from application of the FLSA to public transit systems. The power of Congress to regulate

commerce may not be interdicted on so flimsy a foundation.

For the foregoing reasons, and the reasons set forth in our opening brief,¹⁰ the judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE

Solicitor General

THEODORE B. OLSON

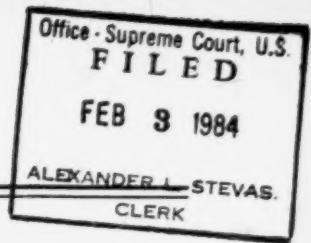
Assistant Attorney General

MARCH 1984

¹⁰ Appellees have, for the third time (see Gov't Reply Mem. at the jurisdictional stage 2 & n.1), pressed their argument (APTA Br. 46-47; SAMTA Br. 47-50) that the public transit provisions of the FLSA are not severable from the applications of the Act that were invalidated in *National League of Cities*. We have responded to this argument in our Reply Memorandum at the jurisdictional stage (at 2-5). It is wholly irrelevant, in this regard, whether SAMTA itself was subject to the 1966 FLSA amendments (compare SAMTA Br. 49 n.41). Even if it were not, Congress's intention to bring transit employment under the umbrella of the FLSA independently of its application to other public employees is readily apparent from the 1966 and 1974 FLSA amendments, which made special provision for covering transit employees (see Gov't Br. 2-4). In fact, however, the 1966 amendments to the FLSA covered employees of a local transit system "if the rates and services of such [system] are subject to regulation by a state or local agency (regardless of whether or not such [system] is public or private or operated for profit or not for profit)." 29 U.S.C. (1970 ed.) 203(r)(2). There is no warrant for reading this language to exclude from FLSA coverage transit systems operated by local government entities that regulated their own fares and services.

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NO. 82-1913
NO. 82-1951



IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JOE G. GARCIA, *Appellant*
V.
SAN ANTONIO METROPOLITAN TRANSIT
AUTHORITY, ET AL., *Appellee*

RAYMOND J. DONOVAN, SECRETARY
OF LABOR, *Appellant*
V.
SAN ANTONIO METROPOLITAN TRANSIT
AUTHORITY, ET AL., *Appellee*

On Appeal From The United States District Court
For The Western District Of Texas

**BRIEF OF AMICUS CURIAE,
THE LEGAL FOUNDATION OF AMERICA
SUPPORTING AFFIRMANCE**

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BRIEF OF AMICUS CURIAE,
THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation designated as a public interest law firm under regulations of the Internal Revenue Service. It is located on the campus of the South Texas Law School in Houston and has particular expertise in matters of economic policy, public policy, and constitutional law. LFA does not accept private fees but is supported by the law school and by private contributions. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

LFA has long had an interest in cases involving the federal-state balance. It has appeared as amicus curiae in such cases in this honorable Supreme Court, in the federal courts of appeal and district courts, and in the courts of the several states. It has

supported the exercise of federal authority in some cases, including authority over interstate commerce, national defense, and civil rights enforcement. In some cases, it has supported the interests of state or local governments. It has provided legal representation to states, bar associations, local government units, and other governmental entities in some such cases, as well as appearing in its own name.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision in *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979), provides an objective test for distinguishing "integral" or "traditional" state functions. The *Amersbach* test accurately reflects existing decisions. It is consistent with longstanding concepts of economics and political science, identifies those state functions in which recognition of sovereignty is most important, and is the only such test that has achieved wide acceptance. The purpose of this brief is to suggest the appropriateness of the *Amersbach* test as a means of resolving the case at bar and as a means of preserving consistency in this area of constitutional law.

ARGUMENT

THE TEST OF *AMERSBACH V. CITY OF CLEVELAND*, 598 F.2d 1033 (6th Cir. 1979), IS THE MOST APPROPRIATE MEANS FOR DISCERNING "INTEGRAL" OR "TRADITIONAL" STATE FUNCTIONS.

In *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979), the court set out a test for "integral" or "traditional" state functions, as follows:

(1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider

of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a community wide need for the service or activity.

The court deduced this test by "analyzing the services and activities which the [Supreme] Court characterized [in National League of Cities] as typical of those performed by governments." *Id.*

This Amersbach test has since been widely accepted, and it is submitted that it is an appropriate means for resolving the issue at hand.

- A. *The Amersbach test accurately reflects existing decisions distinguishing functions that are "integral" or "traditional" from those that are not.*

The Amersbach test provides objective criteria for distinguishing fire, police, sanitation, or hospital activities (which have been held to be within the rule of National League of Cities)¹ from activities, such as selling bottled water or producing oil and gas, which have not.² Amersbach accurately reflects these existing categorizations because it was based on a careful analysis of precisely those categorizations.

- B. *The Amersbach test is consistent with long-standing, generally accepted concepts of economics and political science.*

An economist or political scientist would immediately recognize the concept embodied in the Amersbach test. In non-technical terms, the Amersbach criteria describe what these scholars would call a "public good." Harvard economist Robert

1 National League of Cities v. Usery, 426 U.S. 833, 851-52 (1976).

2 New York v. United States, 326 U.S. 572 (1946); Public Service Co. v. FERC, 587 F.2d 716 (5th Cir. 1979).

Dorfman describes public goods as "Goods that cannot be assigned to individual consumers or firms. The welfares of several (or all) consumers or firms are affected jointly by the total amount of public goods in the community."³ Former Professor (now Circuit Judge) Richard Posner provides a similar definition, stressing that the good cannot be accurately priced in market terms because its use by anyone benefits the community as a whole.⁴ Examples of "important" public enterprises given by Economist Richard Caves include the following: "... the postal service, water and sewer services, [and] local transportation . . ."⁵

In this connection, it should be added that the Amersbach test provides a complete answer to the argument of Appellant Garcia, whose brief raises the spectre of a "state take-over from the private sector of the provision of goods and services" if States can operate government enterprises "free of the federally-imposed costs."⁶ Public goods are precisely those that *cannot* be

3 R. DORFMAN, *PRICES AND MARKETS* 195 (3d ed. 1978).

4 R. POSNER, *ECONOMIC ANALYSIS OF LAW* 351 (2d ed. 1977).

5 R. CAVES, *AMERICAN INDUSTRY: STRUCTURE, CONDUCT AND PERFORMANCE* 113 (5th ed. 1982).

6 Brief of Appellant Garcia at 13. There are several reasons why Garcia's arguments are unpersuasive. In the first place, Garcia assumes government would use "eminent domain." *Id.* But to do so, it would be required to pay full compensation at market rates. That payment is usually impractical (and was difficult for local governments even in the transit situation). Secondly, the efficiency losses attributable to substituting political decisionmaking for market information are substantial and would make such "takeovers" impractical. R. DORFMAN, *supra* note 5, at 174. Finally, Garcia's argument that there would be a "powerful incentive" for such "takeovers" ignores the reality that covered government services involve losses, not profits, requiring large taxpayer subsidies.

In fact, application of regulations designed for the private sector indiscriminately to subsidized government services has the economic effect of decreasing the ability of government to provide those services at the proper level in a mixed economy. See part D of this brief, below.

efficiently provided by private enterprise, and hence the Garcia argument is ill-considered.

Amicus curiae recognizes that the concepts of economics and political science cannot always be read directly into the law. However, the congruence of the Amersbach test with traditional scholarly criteria for recognizing "integral" governmental functions, and its ability to avoid completely the issues raised by Appellants, is an indication of its soundness.

C. *The Amersbach test is the only approach that has gained widespread acceptance among courts considering the problem at issue.*

The Amersbach test has been repeatedly cited by both district and appellate courts in several circuits. These courts have found that Amersbach provides an accurate, objective means for solving the problem at hand.⁷

D. *The Amersbach test identifies those functions in which States most need recognition of their sovereignty.*

A state may not need recognition of its sovereignty in matters such as sale of bottled water or oil and gas production. But governmental services that are provided to the public at large subsidies, requiring that all members of the public be served without regard to the difficulty of such service, at all hours and on holidays, and in spite of emergencies, require the state to function with some breathing space for its sovereign capacity. In terms of Appellant Garcia's economic arguments, the Amersbach test accurately and reliably identifies governmental services of this

⁷ E.g., *Molina-Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982) (authority planning mass transit system held an integral state function, following Amersbach); *Woods v. Homes & Structures of Pittsburg, Kansas, Inc.*, 489 F. Supp. 1296 (D. Kan. 1980) (private development bonds held not an integral state function, following Amersbach).

nature. A transit, fire, or police service, for example, cannot take its necessary place in the provision of goods and services if it is subjected to regulation suited to the private market, making it more difficult for it to operate during the "graveyard" shift.⁸

CONCLUSION

The Amersbach test affords a reliable, realistic, and consistent means for recognizing protected governmental services. It is congruent with traditional scholarship, has been accepted by both trial and appellate courts facing diverse federalism issues, and identifies precisely those services for which state sovereignty most requires recognition.

Under the Amersbach test, local public transit is a clearly protected government service. The opinion of the district court in this regard is well reasoned and should be affirmed.⁹

8 Government enterprise in these areas cannot operate as efficiently, because it is deprived of the informational input of the market and must rely instead on political choices. R. DORFMAN, *supra* note 5, at 174.

9 Public transit benefits the community as a whole by eliminating pollution, alleviating congestion, conserving energy, and stimulating economic development. It cannot be priced at its true cost to each rider (because then, the rational driver would take his car more cheaply, leaving it to others to take transit and alleviate congestion—a formula for failure of transit). Riders therefore pay only a small fraction of the true cost. It is clear that government does not operate transit for pecuniary gain, but rather for public service and community wide benefit. 557 F. Supp. at 453.

Finally, government is particularly well suited for the purpose. It provides most local public transit. As the district court pointed out, 557 F. Supp. 454, counting the number of transit services is misleading. In 1978, governmentally operated public transit accounted for 91 per cent of vehicle miles, 91 per cent of linked passenger trips, 90 per cent of mass transit revenues, and 87 per cent of transit vehicles.

Thus the Amersbach test strongly supports the conclusion that governmentally provided mass transit is an "integral" function of state and local government. 557 F. Supp. 454.

Respectfully submitted,

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ION FILES
DEC 28 1983

Nos. 82-1951 and 82-1913

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT
AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT
AUTHORITY, *et al.*,
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On Appeals From The United States District
Court For The Western District Of Texas

**MOTION FOR LEAVE TO FILE, AND BRIEF
AMICUS CURIAE OF THE NATIONAL INSTITUTE
OF MUNICIPAL LAW OFFICERS IN SUPPORT
OF APPELLEES**

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IN THE
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OCTOBER TERM, 1983

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**On Appeals From The United States District
Court For The Western District Of Texas**

**MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE**

The National Institute of Municipal Law Officers [NIMLO], pursuant to rule 36.4, moves the Court for leave to file the attached brief as *amicus curiae* in support of the appellees, San Antonio Metropolitan Transit Authority, *et al.* This motion and brief is filed on behalf of NIMLO and the local governments whose chief legal officers have signed the brief.

NIMLO submits that its brief can assist the Court in evaluating the importance of mass transit operations to local governments. In addition, the brief can assist the Court in determining the suitability of publicly owned mass transit systems for Tenth Amendment protection from federal encroachment. NIMLO's interest in this case is set out in the Interest of the Amicus Curiae section of the attached brief. That brief sets out facts demonstrating the essential nature of mass transit operations to local governments and shows the historic relationship between state and local governments and mass transit systems.

Because of the increasing role of public ownership of transit operations, this case is of nationwide importance, and, we submit, the attached *amicus curiae* brief will assist the Court in evaluating the nationwide importance and impact of the decision in this case.

Therefore, we urge the Court to grant NIMLO leave to file the attached brief as *amicus curiae*.

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December 1983

Appellee San Antonio Metropolitan

- Transit Authority, has withheld
consent. -

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On Appeals From The United States District
Court For The Western District Of Texas

**BRIEF OF THE NATIONAL INSTITUTE OF
MUNICIPAL LAW OFFICERS AS AMICUS CURIAE**

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed on behalf of the more than 1,600 local governments, or political subdivisions of states, which are members of the National Institute of Municipal Law Officers [NIMLO]. The member local governments operate NIMLO through their chief legal officers, variously called city attorney, county attorney, corporation counsel, city solicitor, director of law, and other

titles. Each member local government has one vote on all actions taken by the NIMLO organization. This brief *amicus curiae* is signed by the chief legal officers of NIMLO members on behalf of their own local governments and the chief legal officers of the members of NIMLO in their official capacity. San Antonio, Texas is a member of NIMLO.

NIMLO is a nonpartisan, nonpolitical, fact-gathering and reporting organization that provides information and research to its member local governments on current legal problems of local concern, including mass transit labor issues and issues involving federal-local relations.

The local government attorneys who participate in NIMLO's work are responsible for negotiating and drafting labor contracts with municipal employee unions, including mass transit employee unions. The attorneys are also intimately involved in the budgetary processes of local governments, and are responsible for advising local governments on the applicability of federal statutes and regulations to municipal mass transit activities.

NIMLO is greatly concerned that a reversal of the opinion below will result in a combination of an increase in transit rates for the tens of millions of transit riders in this Nation and a reduction in the quality and quantity of the mass transit services provided. Those least able to pay the increased fares, the poor and the elderly, will be harmed the most. NIMLO is equally concerned that an adverse ruling will deprive state and local governments of the right to regulate, free from federal intrusion, the wages and hours of their employees providing other traditional and essential governmental services. The Tenth Amendment guarantees them this right. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

NIMLO, therefore, respectfully urges this Court to affirm the opinion below that mass transit is a traditional governmental function entitled to Tenth Amendment immunity. This will protect the transit riding public from harm and preserve the independent integrity of state and local governments that is essential to the operation of our federalist system.

STATEMENT OF THE CASE

The Statement of the Case set forth in Appellee American Public Transit Association's Motion to Affirm is adopted by the National Institute of Municipal Law Officers for purposes of this brief *amicus curiae*.

SUMMARY OF ARGUMENT

Publicly owned mass transit systems today are the predominant providers of mass transit services. Mass transit has become an integral component of state and local government land use planning, and it serves crucial environmental, social, and economic goals.

Historically, mass transit has been a concern of state and local governments, with minimal federal intrusion. State and local governments have long been involved with mass transit systems as franchisors and regulators, but severe economic problems, coupled with the desire to increase the scope of services provided by mass transit, have recently compelled governmental takeovers of regulated private transit operations.

Mass transit today is a traditional and integral function of state and local government. The Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981) [FLSA],

impermissibly imposes federal minimum wage and maximum hour regulations on local mass transit operations. The imposition of the FLSA on local public transit operations places a severe financial burden on local transit systems and directly imposes hardships on all classes of transit riders, but especially the poor and the elderly.

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the minimum wage and maximum hours provisions of the FLSA could not constitutionally be applied to the integral and traditional operations of state and local governments. When Congress attempts to displace directly the state and local governments' freedom to structure integral operations in areas of traditional governmental functions, it exceeds its grant of authority under the Commerce Clause.¹

The basic holding of *National League of Cities* has been reaffirmed by this Court on numerous occasions, most recently last Term in *EEOC v. Wyoming*, 103 S.Ct. 1054 (1983). See also *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *United Transportation Union v. Long Island Railroad Company*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981).

An examination into the current role of state and local governments in mass transit operations compels the conclusion that the operation of publicly owned mass transit systems is today a traditional governmental function. A study of the historical role played by state and local governments in transit operations buttresses this conclusion. Therefore, Congress' attempt to impose FLSA rules and regulations on publicly owned mass transit systems exceeds its authority under the Commerce Clause.

¹U.S. CONST. art. I, § 8, cl. 3.

ARGUMENT

I. THE OPERATION OF PUBLICLY OWNED MASS TRANSIT SYSTEMS IS AN INTEGRAL AND TRADITIONAL FUNCTION OF STATE AND LOCAL GOVERNMENT

A. Mass Transit Today Is A Service Provided Almost Exclusively By State And Local Governments.

The term "traditional" has a variety of meanings, depending in part on the context of the particular issue. While the term "traditional" does imply an historic component, within the context of Tenth Amendment analysis "traditional" is not inexorably entwined with history. In fact, a strictly historic view of traditional functions has been explicitly rejected by this Court. *Long Island Railroad*, 455 U.S. at 686-87.²

Traditional, therefore, implies more than historical. A traditional function is a practice that is customary, common, pervasive, or routine. Under this kind of analysis, it is clear that in the area of mass transit operations, public ownership is a traditional governmental function. More than 250 of the 279 urbanized areas with populations over 50,000 people are served in whole or in part by publicly owned mass transit systems. Each of the 50 largest metropolitan areas is served by a publicly owned mass transit system.³

²"This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." *Long Island Railroad*, 455 U.S. at 686-87.

³United States Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population*, at 1-12 (Aug. 1981).

An analysis of ridership statistics further demonstrates the predominance of state and local governments in mass transit operations. Ninety-four percent of all transit riders are carried on publicly owned mass transit systems. Ninety percent of all transit vehicles are owned and operated by public transit systems and these vehicles travel 93 percent of all the miles travelled by mass transit vehicles.⁴

B. Publicly Owned Mass Transit Systems Serve Important Local Goals.

Mass transit has become an important means of achieving governmental social, economic and environmental goals, such as serving special segments of society unable to afford other means of transportation, pollution control, energy conservation, and economic development and planning. These benefits accrue not just to transit riders, but to the public as a whole. The increased costs attendant upon application of the FLSA to publicly owned mass transit systems frustrates the achievement of these goals.

The poor, the elderly, and the handicapped are particularly dependent on publicly owned mass transit systems. A 1971 survey indicated that while 38 percent of people with incomes below \$4,000 use bus services, only 28 percent of people with incomes over \$15,000 ride buses.⁵ A similar survey revealed that 70 percent of all bus and light-rail riders had incomes of \$10,000 or less.⁶ For the

⁴American Public Transit Association, *Transit Fact Book*, at 43 (1981 ed.).

⁵United States Department of Transportation, Urban Mass Transportation Administration, *Moving People, An Introduction To Public Transportation*, at 29 (1981).

⁶*Id.* at 35.

poor, many of whom do not own cars, publicly owned mass transit is the sole means of affordable transportation. Increased labor costs invariably lead to increased fares, which in turn make mass transit less accessible to those most dependent on it, the poor.

The elderly are similarly dependent on publicly owned mass transit. Many elderly individuals are physically unable to drive an automobile or have never learned to drive. In addition, many elderly individuals are too frightened to drive in congested urban areas or do not even own automobiles. As with the poor, the elderly are, to a large extent, dependent on publicly owned mass transit for their transportation.

Section 504 of the Rehabilitation Act⁷ prohibits discrimination against the handicapped in any program receiving federal funds. In addition, § 16(a) of the Urban Mass Transportation Act⁸ requires that "special efforts" be made to provide mass transportation to the elderly and handicapped. As these statutory commands are being implemented, more and more handicapped and elderly individuals will have access to publicly owned mass transit systems.

Besides providing transportation for special segments of the population, mass transit plays a crucial role in the economic development of municipalities and regional areas. For example, 78 percent of all office space constructed in San Francisco between 1962 and 1970 was constructed within a five-minute walk of Bay Area Rapid

⁷29 U.S.C. §794.

⁸49 U.S.C. §1612(a) (1976 & Supp. V. 1981).

Transit stations.⁹ Similar developments have occurred in Chicago, Boston, and Philadelphia.¹⁰ In the Washington D.C. area, municipal governments are clustering development projects around nearby Metrorail stations. It has been estimated that the subway system in Washington, D.C. will itself generate \$6 billion worth of private development projects. The rapid transit system in San Francisco was estimated to have generated \$1.4 billion worth of construction activity in that city.¹¹ For businesses considering relocating, proximity to mass transit is a primary factor in choosing a new site.¹²

The heightened economic activity caused by publicly owned mass transit is crucial to the financial viability of many metropolitan areas. New investments create jobs, thereby lessening unemployment. In addition, the operation of a transit system itself creates numerous employment opportunities. Increased property values resulting from new development broaden the tax base and increase tax revenues. The improved economic climate benefits the entire community.

Another benefit realized from mass transit is a significant reduction in air pollution. It has been estimated that for 1980 alone, mass transit reduced the amount of hydrocarbons by 15,000 tons, reduced carbon monoxide by 147,000 tons, reduced nitrogen oxide by 35,000 tons,

⁹*Moving People*, *supra* note 5, at 31.

¹⁰"Public Transit and Downtown Development," *Metropolitan*, at 48 (May-June 1980).

¹¹*Transit Fact Book*, *supra* note 4, at 22.

¹²*Moving People*, *supra* note 5, at 31; "Trend: Moving Offices to Where Transit Is", *Passenger Transport*, at 1 (December 8, 1971); *Transit Fact Book*, *supra* note 4, at 22.

and reduced particulate matter by 5,000 tons.¹³ If 50 people ride a bus instead of drive, air pollution is reduced by 10 to 25 times.¹⁴

Energy conservation is a goal similarly served by mass transit operations. In 1980, the use of mass transit saved almost 40 million barrels of petroleum fuel.¹⁵ As transit use increases, this figure will inevitably increase. In addition, should the Nation again be victimized by an energy crisis, urban areas will be dependent on publicly owned mass transit systems to bring people to work and to business shopping districts.

C. History Demonstrates That Mass Transit Operations Are Traditionally Matters Of State And Local Concern.

Historically, mass transit operations have been a matter of state and local concern. Initially, transportation systems were owned and operated by the private sector, but state and local governments have always been responsible for granting franchises and regulating routes, fares, schedules, and safety.¹⁶ There is no similar history of federal regulation of transit operations, and even today mass transit regulation is primarily a local concern.

Over the last several decades state and local governments had to take over the operations of mass transit

¹³*Transit Fact Book*, *supra* note 4, at 38.

¹⁴*Moving People*, *supra* note 5, at 31.

¹⁵*Transit Fact Book*, *supra* note 4, at 25. 0.15 gallons of gasoline are saved for each trip on a transit vehicle instead of by automobile.

¹⁶*Munn v. Illinois*, 94 U.S. 113, 125 (1876): "[In the exercise of the police power] it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen . . . and in so doing to fix a maximum charge to be made for services rendered. . . ."

systems directly rather than to continue merely to regulate transit operations. Whereas mass transit operations used to be profit-making enterprises, it became apparent that if reasonably priced, universal, and dependable public transit was to exist, government ownership was required because transit operations were no longer profitable.¹⁷

Several factors have been identified as contributing to the decline of private mass transit operations. The general migration from the central city into the suburbs was greatly responsible for the decline in ridership from 13.8 billion passengers in 1950 to only 5.7 billion passengers in 1977.¹⁸ At the same time that ridership was decreasing, the operating costs per transit mile were increasing at twice the annual rate of inflation.¹⁹

Aside from decreasing ridership and inflationary pressures, the other major causes of the decreased profitability of mass transit were rising labor costs, the use of public transportation to help meet social and environmental goals, and the high costs attendant to moving high concentrations of riders during peak rush hours.²⁰

Private transit companies could cope with these increased costs in ways that only would serve to harm the public. The private companies could raise fares, cut ser-

¹⁷W. . . [I]n recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service. . . ." National Mass Transportation Assistance Act of 1974, 49 U.S.C.A. §1601(4).

¹⁸*Moving People*, *supra* note 5, at 17.

¹⁹United States Department of Transportation, Urban Mass Transportation Administration, Institute of Public Administration, *Financing Transit: Alternatives For Local Government*, 8, 9 (July 1979).

²⁰*Moving People*, *supra* note 5, at 17-19.

vices, reduce maintenance, or refuse to make necessary capital expenditures. The state and local governments responsible for ensuring that adequate transportation systems existed were faced with two choices. Either stand by as the private systems folded or reduced services, or, instead, move from being regulators of local transit operations to being providers of transit services. The state and local governments chose to provide for transit services themselves.

With public ownership of transit operations, the profit motive has disappeared as a factor in providing mass transit.²¹ Low cost, universal, efficient mass transit operations are in existence today solely because state and local governments own and operate transit systems.

II. THE INTEREST OF STATE AND LOCAL GOVERNMENTS IN PROVIDING EFFICIENT AND REASONABLY PRICED TRANSIT SERVICES TO THEIR CITIZENS FAR OUTWEIGHS THE MINIMAL FEDERAL INTEREST IN IMPOSING THE FLSA ON PUBLIC TRANSIT SYSTEMS

The interests of the state and local governments far outweigh the minimal federal interest in this matter.

As noted earlier, mass transit is often the sole source of transportation for the poor, elderly, and handicapped. In addition, mass transit plays a crucial role in local economic development and land use planning. Mass tran-

²¹In 1980, fare revenues accounted for only 40 percent of the total operating revenues of transit systems. *Transit Fact Book*, *supra* note 4, at 45. Thus, transit fares would have to be increased by 2½ times in order for fares to equal costs. A 10 percent increase in fares reduces ridership by 3 percent. *Moving People*, *supra* note 5, at 25.

sit also plays a crucial role in reducing air pollution and conserving energy.

The application of the FLSA to publicly owned mass transit systems frustrates and impedes these local objectives. The increased costs imposed on public transit systems by the FLSA reduce both the quality and quantity of the services provided.

Wages for maintenance personnel, drivers, and administrative workers account for 80 percent of the cost of operating public transportation.²² Labor costs alone are estimated to have accounted for over one-third of the total rise in transit costs since 1970.²³

In 1980, preliminary studies indicated that the salary and wages of transit employees totalled just over \$3 billion.²⁴ Each 1 percent increase in labor costs increases by \$30 million the direct labor costs to public transit systems. In addition, a mere 1 percent increase in wages is, on average, matched by a 3.3 percent increase in fringe benefits and a 4.6 percent increase in premium and non-operating time payments.²⁵ The application of the FLSA to local transit systems therefore would impose substantial financial costs at a time when such systems are already operating at a combined deficit of almost \$4 billion,²⁶ and when intense public pressure makes raising fares either impossible or counterproductive.²⁷

²²*Moving People*, *supra* note 5, at 18.

²³*Id.*

²⁴*Transit Fact Book*, *supra* note 4, at 66.

²⁵*Moving People*, *supra* note 5, at 18.

²⁶*Transit Fact Book*, *supra* note 4, at 44. Deficits are measured by subtracting operating revenues from total expenses.

²⁷See note 21, *supra*.

Increased costs are not the only adverse effect which compliance with the FLSA will cause publicly owned mass transit systems. The overtime provisions and their attendant costs will interfere with the manner in which mass transit services are provided. In order to avoid the increased overtime costs required by the FLSA, transit systems will have to alter working schedules to limit employee overtime. This could very well restrict the routes served by public mass transit systems. The minimum wage provisions might limit the number of low-skilled minority employees a system can employ, and might prevent or limit the employment of teenagers during the summer months.²⁸

Simply stated, the FLSA coerces state and local governments into structuring employment practices in a manner that is harmful to the best interests of the overwhelming majority of the citizenry. Faced with increased costs, public transit systems must raise fares or decrease services. Raising fares makes the system less accessible to those who need it most, the poor; raising fares also decreases ridership and thereby lessens the overall benefits of transit operations.²⁹ Reducing services at a time when increased services are demanded is obviously not in the public interest.

The federal interest in applying the FLSA to publicly owned mass transit systems is minimal because transit employees are already very well paid. Between 1970 and 1977, wages in the transit industry rose by 61 percent and, by 1976, transit workers had the *highest* average earnings of any segment of public sector employees.³⁰

²⁸*National League of Cities*, 426 U.S. at 846-49.

²⁹*Moving People*, *supra*, note 5, at 18.

³⁰*Id.* In 1976, the average wage was \$16,032 per year.

In addition, transit workers generally have the benefit of collective bargaining to protect their rights.³¹ It has been estimated by the American Public Transit Association that over 80 percent of public transit employees are unionized.

The combination of high wages and collective bargaining representation demonstrates that the federal interest in imposing the FLSA on publicly owned transit systems is minimal.

CONCLUSION

For the foregoing reasons, the National Institute of Municipal Law Officers respectfully urges this Court to affirm the decision below.

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³¹Urban Mass Transportation Act of 1964, 49 U.S.C. §1609(c) (1976 & Supp. V. 1981), requires protection of transit employee rights in systems receiving federal aid.

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December 1983

Nos. 82-1913 and 82-1951

Office - Supreme Court, U.S.
FILED

FEB 8 1984

ALEXANDER L. STEVAS
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA,

v.

Appellant,

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals from the United States District Court
for the Western District of Texas

**BRIEF FOR THE NATIONAL LEAGUE OF CITIES,
THE NATIONAL GOVERNORS' ASSOCIATION,
THE NATIONAL ASSOCIATION OF COUNTIES,
THE NATIONAL CONFERENCE OF
STATE LEGISLATURES,
THE COUNCIL OF STATE GOVERNMENTS, AND THE
INTERNATIONAL CITY MANAGEMENT ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

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QUESTION PRESENTED

Whether publicly owned mass transit systems—which serve citizens' vital need for transportation and are crucial to modern cities—are a “traditional” governmental function which is protected against intrusive federal action by the Tenth Amendment.

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INTEREST OF THE AMICI CURIAE

The *amici* are organizations whose members include state, county, and municipal governments and officials located throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

The question presented in this case, whether the wage and hour provisions of the Fair Labor Standards Act (FLSA), apply to municipal mass transit systems, is of paramount importance to *amici*. For urban mass transit is an essential public service forming a chief pillar of urban infrastructure, and cannot succeed as a private sector commercial enterprise in urban areas. New demographic and technological circumstances have forced state and local governments into playing the dominant role in providing this essential public service.

Moreover, the issues in this case ~~are~~ not only critical to urban mass transit, but are of profound consequence for the authority and functions of state and local jurisdictions. For these reasons, *amici* are submitting this brief to assist the Court in its consideration of the questions presented in this litigation.¹

STATEMENT OF THE CASE

A. Relevant Facts²

Amici agree with the statement of facts set forth in the brief of appellee American Public Transit Association. In addition, *amici* wish to emphasize several facts which demonstrate the critical importance of this case for state and local governments. The emphasized facts relate both to the San Antonio mass transit system and to mass transit systems in general.

¹ Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

² References to the Record are noted as R. —.

1. Mass Transit Services Are Predominantly Provided by Publicly Owned Systems.

Publicly owned transit systems provide the vast bulk of mass transit services in the United States today. In 1980, local publicly owned systems accounted for 94 percent of all riders, 93 percent of total vehicle miles, and 90 percent of total transit vehicles. American Public Transit Association, *Transit Fact Book*, 27, 43 (1981) (hereafter referred to as *Fact Book*). Moreover, mass transit is principally provided by local governments in 100 of 106 cities with a population greater than 200,000. Urban Mass Transportation Administration, U.S. Department of Transportation, *Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas of Over 50,000 Population* (1979) (hereafter referred to as *DOT Directory*), R. 453-59.

2. Publicly Owned Mass Transit Serves Vital Needs.

The services that public transit systems provide are vital to the functioning of urban society. Without these systems, tens of millions of citizens would have no access to jobs, schools, hospitals, parks and recreation areas, or business and shopping districts. For example, more than 80 percent of the employees who work in central business districts in large metropolitan areas such as Chicago and New York City commute to work on public transit, *Fact Book*, *supra*, at 24, and at least two out of three passengers of the San Antonio bus system are engaged in going to or from school or a job. Affidavit of Wayne M. Cook, General Manager, San Antonio Metropolitan Transit Authority ¶ 14 (hereafter referred to as *Cook Affidavit*), R. 202.

Public mass transit systems are also critical for business development in urban areas: businesses take account of these systems in determining whether and where to locate in metropolitan areas. In San Francisco, for example, two-thirds of the businesses polled listed proximity to mass transit as an important factor in deciding

where to locate. *Fact Book, supra*, at 22. Similarly, it is estimated that the Washington D.C. subway system will stimulate \$6 billion of private development by the time it is completed. *Id.*

In addition, without these publicly-owned transit systems, our nation's cities would be gridlocked by increased traffic congestion and would suffer greatly increased pollution caused by additional automobile emissions.³

3. Publicly Owned Mass Transit Systems Are Particularly Necessary for the Disadvantaged, and Provide Extra Services for Special Classes of Riders.

As is true of other governmental functions such as parks, recreation facilities and police and fire protection, anyone can use public transit services. However, the need for and use of public mass transit is particularly acute for minorities, handicapped persons, the elderly, and others who are economically disadvantaged. Thus, a survey conducted for the San Antonio Metropolitan Transit Authority (SAMTA) indicates that rush hour transit ridership is comprised of 66 percent Mexican-American or Spanish-speaking persons and 14 percent Blacks, and that 84 percent of the riders have incomes below \$15,000. During nonrush hour, 88 percent of the transit riders are minority and 91 percent have annual incomes below \$15,000. *Cook Affidavit, supra*, at ¶ 13, R. 202.

These percentages are not unique to the San Antonio transit system. Thus, in a mass transit case from Macon,

³ The Chicago Transit Authority estimates that, without public mass transit in that city, 100 miles of additional six-lane expressways and six times the parking area presently available in the downtown business district would be necessary to accommodate the increased automobile traffic. *Fact Book, supra*, at 21. Further, the American Public Transit Association calculates that, if all mass transit trips from 1970 to 1980 had been made by automobiles, America's cities would have been polluted by an additional 138,000 tons of hydrocarbons, an additional 1,360,000 tons of carbon monoxide, an additional 327,000 tons of nitrogen oxides, and an additional 46,000 tons of particulate matter. *Id.* at 37-38.

Georgia presently pending on this Court's docket, the lower court found that 94 percent of the riders of the city's publicly owned transit system are "transit captive"—live in a household having no automobile—and that 89 percent of the riders are Black, 80 percent are middle-aged, 80 percent have low incomes, and 66 percent are women. *Alewine v. City Council*, 699 F.2d 1060, 1064 (11th Cir. 1983), petition for certiorari filed sub nom. *City of Macon v. Joiner*, No. 82-1974, 51 U.S.L.W. 3884.

San Antonio, like many of its urban counterparts throughout the country, also provides extra, beneficial public services to special classes of transit riders. For example, the elderly and the handicapped ride the transit system at substantially reduced rates, bus service for shoppers in the central business district is free, and the immobile handicapped, totally dependent on transit services, are provided with special van service which picks them up at their doors and delivers them to their destinations. *Cook Affidavit, supra*, at ¶¶ 9-12, R. 200.01. Other transit systems aid handicapped riders by providing buses equipped with mechanical kneeling devices for easy boarding. Urban Mass Transportation Administration, U.S. Department of Transportation, *Financing Transit: Alternatives for Local Government* (report prepared for the Department of Transportation by the Institute of Public Administration) (hereafter referred to as *Financing Transit*) 261 (1971).

4. Mass Transit Has Long Been Regulated By State and Local Governments.

Because it is a critical part of the infrastructure of urban areas, mass transit has long been the subject of extensive regulation by state and local governments. See, *San Antonio Metropolitan Transit Association v. Donovan*, 557 F. Supp. 445, 447-48 (W.D. Tex. 1983). Historically, local governments have regulated fees, routes, schedules, franchises, and safety, even though the transit systems were privately owned. *Id.* at 448. For example, as far

back as 1913, Texas cities received exclusive authority from the state legislature to regulate fares and operations of vehicles used for carriage for hire. 1913 Tex. Gen. Laws, Ch. 147, § 4, at 714, *as codified*, Tex. Rev. Civ. Stat. Ann. art. 1175, §§ 20, 21 (Vernon 1963). Conversely, the federal government historically has *not* regulated local mass transit systems.

5. *Changing Conditions Made Mass Transit Unprofitable for Private Enterprise, Thus Forcing Local Governments to Provide This Vital Service.*

In the 1950's and 1960's, there was a shift in population from the cities to the suburbs, fueled in part by federal programs such as the Interstate Highway Act of 1956 and low cost housing loans of the Veterans Administration and Federal Housing Administration. See generally, *Financing Transit, supra*, at 3-7. An unintended consequence of these federal initiatives was a major increase in the cost of providing mass transit to an ever-expanding metropolitan area. Mass transit systems were no longer profitable and private companies began to go out of business. The situation spelled disaster for millions of citizens, particularly the "transit captive": the poor, the elderly, the handicapped and minority groups, all of whom rely on mass transit for accessibility to essential human services.

To ensure provision of these vital transport services, necessary to maintain the viability of the city itself, local governments had to go beyond regulation, and had to take over ownership of mass transit systems. See *Financing Transit, supra*, at 14-16. Thus, in 1959 the City of San Antonio purchased the San Antonio Transit Company and provided mass transit as a municipal service. *Cook Affidavit, supra*, at ¶ 2, R. 197. San Antonio, like several major American cities before it, acquired the transit company without the aid of federal funds.⁴

⁴ Seattle did the same in 1911, San Francisco in 1912, Detroit in 1921 and New York City in 1932. See, Affidavit of Stanley G. Feinsod, Executive Director, Policy and Programs, American Pub-

However, in response to requests from state and local governments and other entities, Congress later realized that federal assistance would be necessary to help local governments acquire transit facilities and assure the maintenance of vital municipal transport services. In 1964, therefore, Congress enacted the Urban Mass Transportation Act (UMTA). 49 U.S.C. §§ 1601 *et seq.* (1976 and Supp. V 1981).

Thereafter, mass transit systems quickly became a publicly owned function to an overwhelming degree. By 1978, 91 percent of the riders, 91 percent of the vehicle miles, 90 percent of the revenues and 87 percent of the vehicles were accounted for by publicly owned systems. *Feinsod Affidavit, supra*, at ¶ 4, R. 176. The full burden of providing essential transport services thus fell upon local governments and their publicly owned entities. The private companies simply left the business wholesale; they provided neither aid to nor competition for the public systems. The public systems were left to shoulder the entire responsibility themselves.

6. Publicly Owned Mass Transit Systems Are Governed and Financed In the Same Way As Other Public Services Provided by Local Governments.

After acquiring facilities from private transit systems, local governments administered them in the same way as other basic public services such as schools, parks, and hospitals. In San Antonio, for example, SAMTA is governed by a board of trustees appointed by the San Antonio City Council, the Bexar County Commissioners, and the mayors of the incorporated cities served by the system. *Cook Affidavit, supra*, at ¶ 3, R. 197. This ap-

lic Transit Association (hereafter *Feinsod Affidavit*), at ¶ 4, R. 176. By the time the federal government began providing funds to aid local governments in purchasing mass transit systems, over half the residents of cities with a population of or exceeding 250,000 were served by publicly owned transit. See Appellee American Public Transit Association's Motion to Affirm at 11, *Donovan v. San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

pointed board regulates all of SAMTA's operations. SAMTA itself is a political subdivision of the state of Texas and its creation had to be approved in an election. *Id.* at ¶¶ 2-3, R. 196-197. Moreover, as an instrument of state government, SAMTA has authority to levy and collect taxes, issue bonds, and bring eminent domain proceedings. *Id.* at ¶ 3, R. 197. The key administrative decisions necessary to operate SAMTA are thus made by state and local government officials.

Also, local governments extensively finance transit systems in the same way they finance other basic public services such as police and fire protection, maintenance of park and recreation areas, and public health services. Financing methods used to subsidize public transit systems include general revenue, property, *ad valorem*, mortgage, parking, sales, cigarette, and earnings taxes, lottery proceeds, and bridge tolls. *Feinsod Affidavit, supra* at ¶ 8A, R. 178. See generally, *Financing Transit, supra*.

These financing mechanisms are necessary to subsidize public transit systems, which operate at a loss. For example, during SAMTA's first two fiscal years, it had an operating budget of \$41.6 million, while total revenue from fares was only \$10.1 million. A permanent sales tax levy of $\frac{1}{2}$ of 1 percent, which the voters approved to subsidize SAMTA, provided an essential \$26.8 million during these first two years to help satisfy the system's \$31.5 million operational deficit. *Cook Affidavit, supra*, at ¶ 2, ¶ 6, R. 196, 198.

7. Mass Transit Workers Are Paid Fairly.

Despite heavy operational losses, public transit operators are paid fairly, especially in comparison to other public and private workers. Available figures show that the wages of transit operators have exceeded those of other full-time city employees and those of workers in the manufacturing and construction industries. In addition, transit wages rose by a greater percentage than the

wages of manufacturing workers and by approximately the same percentage as the wages of construction workers during the period 1950-1977.⁵ Department of Labor statistics also demonstrate that transit wages are competitive with the wages of workers in the printing trades and with the earnings of truck drivers and their helpers. See, *e.g.*, Bureau of the Census, U.S. Department of Commerce, *Statistical Abstract of the United States*, Table Nos. 708, 709 (1980).

As these facts make clear, the wages of transit workers are far above the minimum hourly wages prescribed by the FLSA—the standard appellants seek to impose in this case. A 1981 government survey indicates the median hourly wage for transit operating employees was \$9.01 per hour, nearly triple the then prevailing minimum wage. U.S. Department of Labor, *Union Wages and Benefits: Local Transit Operating Employees*, Table 2 at 4 (1981).

⁵ The following chart, printed in *Financing Transit* at 11, compares the earnings of transit workers, full-time city employees, and manufacturing and construction workers during 1950-1976.

**COMPARATIVE TRENDS IN TRANSIT
AND OTHER WAGES 1950-1977**

	Amount		Percent Increase in Wages in Constant- Value Dollars
	1950	1977	
Transit, average annual wage	\$3,479	\$14,885	70%
Manufacturing, annualized weekly rate ^a	2,916	11,445	56
City employees ^b	3,084	13,008	68
Contract construction	3,484	14,783	71

^a Average weekly wages multiplied by 50. This procedure overstates annual wages in manufacturing and construction, both of which, but particularly construction, are more subject to seasonal fluctuations than is transit, where employment is fairly steady.

^b Computed average compensation for full-time employees for October multiplied by 12.

The competitive wages paid to transit workers are safeguarded by a very strategic bargaining position—vast dependence of citizens on public transit systems. A work stoppage by transit employees could cripple a city and has to be avoided if at all possible. This fact gives transit workers tremendous leverage in collective bargaining. The wages of transit workers therefore continue to rise despite cutbacks in federal financial assistance to state and local governments and lean budgets for vital public services at all levels of government.

Another major factor in the competitive wages of transit workers is that transit systems have to schedule employees' work in split shifts in order to cover peak commuter hours in the morning and evening, and the systems therefore provide "spread premium compensation" to employees who work split shifts. See Chomitz and Lave, *Forecasting the Financial Effects of Work Rule Changes*, 37 Transp. Q. 453 (1983). This factor also demonstrates the need for operational flexibility, which would be seriously impaired if the FLSA were to apply. A split shift schedule, and its effects on wages, can be exemplified as follows:

A transit employee will work a morning shift and an evening shift during peak commuter hours, with a mid-afternoon break during off-peak hours. Each shift can be four hours, with the break being four hours. Thus the workday may be spread over twelve hours, but only eight of them would involve working time.

Transit employees receive a premium rate of pay because of the spread of the workday. Thus after ten hours have elapsed, six of which have been spent working and four of which have been off-hours, the employee will receive premium compensation for the remaining two hours that he or she works.* Over a normal five-day work week, the employee would receive regular compen-

* The level of such premium compensation varies. It can range up to one and one half times the normal rate of pay.

sation for 30 hours and premium compensation for 10 hours. Transit systems would thus compensate employees at a premium rate for one quarter of their normal work.

Imposing FLSA requirements, however, would require public transit systems to pay their employees even greater sums of money. The precise level of the increase would vary with the interrelationship of specific employment circumstances and complex FLSA requirements. But the end result would be a substantial increase in the overall wage costs of public mass transit, which is labor-intensive and already has to be heavily subsidized because it loses large amounts of money. See Chomitz and Lave, *supra*, at 456-463. The FLSA concomitantly would decrease public transit systems' flexibility to schedule work hours in a fair way that meets citizens' need for transportation without incurring prohibitive costs. Moreover, imposition of the wage and hour provisions of the FLSA could have undesirable effects on the provision of other public services by local governments, since budget priorities may have to be adjusted to make up for the increased costs of transit services.

B. The Decision Below

The Court below held mass transit is protected by the Tenth Amendment because it is a traditional governmental function. The Court found there is a long record of state concern with mass transit. 557 F. Supp. at 448. It pointed out that this concern initially was expressed through extensive state and local regulation, but now local governments have become the primary provider of mass transit services. *Id.* at 448-449, 452-453, 453-454. To rule mass transit is not a traditional governmental function, held the Court, would represent "the static historical view of state functions" eschewed by this Court in *United Transportation Union v. Long Island R. R. Co.*, 455 U.S. 678 (1982). *Id.* at 450. Nor did the Court find any principled distinction between mass transit and

other state and local activities which have received large federal grants but which this Court held to be traditional governmental functions in *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976). *Id.* at 451.

The Court also recognized that mass transit benefits the community as a whole, is operated at a large loss which is primarily subsidized by state and local taxes, and, because it is unprofitable, can only be supplied by government. *Id.* at 453. Finally, the Court ruled that federal regulatory responsibility would not be eroded by declaring mass transit to be a state or local governmental function. *Id.* at 448-450. Rather, both the states and Congress have recognized that public transportation is an essential function of state and local governments. *Id.* at 451.

SUMMARY OF ARGUMENT

1. This Court has previously used a three-pronged test for determining whether a state or local activity is protected against intrusive federal action by the Tenth Amendment. Under the third prong, the activity must be a "traditional governmental function." This prong, the Court has said, "was not meant to impose a static historical view of state functions." *United Transportation Union v. Long Island R.R. Co.*, *supra*, 455 U.S. at 686. Thus, it cannot and does not require that a function be identical to a prior activity of state or local governments. Rather, it requires only that an activity be of the same genre or type as prior ones. An activity *is* of the same genre or type if it serves the same purposes or policies as prior activities.

Were the third prong to require more—were it to require that an activity be identical to prior ones—the concept of traditional governmental function would be statically frozen as of a prior date in history, and state and local governments would be unprotected when they alter their activities to meet the changing needs of citizens.

The provision of mass transit is a type of function traditionally performed by state and local governments. Publicly owned mass transit systems are a vital part of the local transportation infrastructure, for which local governments have always taken significant responsibility. Publicly owned systems came into existence because private companies could no longer supply essential services needed by tens of millions of citizens, particularly the less affluent, minorities, the young and the elderly. The public systems now supply over 90 percent of all mass transit service, and have very little or no competition from private mass transit companies. Publicly owned systems help to further other traditional governmental functions, and are intended solely to serve the public good rather than to make a profit.

Furthermore, because mass transit is an activity in which local governments have now been extensively engaged for at least twenty years, it not only is a *type* of function traditionally performed by local governments, it is a function traditionally performed by them.

2. Appellants are incorrect in asserting that mass transit is not a traditional governmental function because "primacy" must be given to history under *LIRR*. *LIRR* specifically rejected a static historical test. But that is precisely the test appellants seek to impose here. For they ignore the history of the last twenty years, during which mass transit overwhelmingly became a governmental function rather than a private one.

Moreover, *LIRR* was quite different from this case in critical respects. In *LIRR* the service at issue, commuter railroads, was overwhelmingly provided by private companies at the time of suit. Here the service at issue is overwhelmingly provided by publicly owned systems. Also, in *LIRR* the Court was concerned that century-old federal regulation of general railway matters and railway labor relations would be eroded, with disastrous effects upon the national economy. Here regulation

has been by state and local governments, not the federal government, and there is no danger of harm to the national economy.

3. Application of the FLSA would gravely harm significant interests of local governments. The already high costs and losses they incur in providing mass transit would be increased, and their ability to develop innovative and flexible working schedules necessitated by commuting patterns would be stifled. Harms such as these were a major reason this Court refused to countenance imposition of the FLSA in *National League of Cities v. Usery, supra*.

On the other side, there will be no impairment of federal interests if the FLSA is not applied to transit operators. The operators already receive competitive wages, have fair working hours, and possess a strategic bargaining position that ensures such wages and hours.

4. Finally, appellants are incorrect in claiming that publicly owned mass transit systems should not qualify for Tenth Amendment protection because local governments used UMTA funds in acquiring and operating transit systems.

First, this Court has ruled that if Congress intends to impose conditions upon receipt of federal grants, it must do so unambiguously, so that state and local governments will know the obligations they are assuming and can judge whether they nonetheless wish to accept the grants. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). The UMTA, however, does not condition its grant monies upon compliance with the wage and hour provisions of the FLSA. Indeed, when it passed the UMTA, Congress eschewed creating a body of federal labor law applicable to relations between local governments and transit operators. Moreover, San Antonio acquired its transit system even before passage of the UMTA and without federal funds.

Second, and of even greater importance, appellants' argument will gravely impair the federal nature of our system. As the federal government commonly does, appellants are relying on federal funding to justify displacement of state and local authority on a subject vital to state and local governments. But such position will vitiate federalism because the ability of the federal government to raise money through taxation and borrowing is far superior to that of state and local governments. Due to its superior financial power, the federal government grants over \$80 billion annually to state and local entities. The grants are necessary to enable state and local governments to effectively carry out such essential sovereign functions as health, education, safety, police protection and roadbuilding, and are essential both to meet operating costs and to acquire vital capital facilities. Without the grants, state and local governments would be gravely hampered in performing their sovereign duties effectively.

Thus, if grants enable the federal government to displace state and local authority, then national power will be aggrandized and state and local power will be diminished across a broad range of critical state and local activities. This result undermines the constitutional plan of federalism, under which power is divided among levels of government. Huge federal grants did not deter the Court from precluding federal intrusion upon areas of state and local decisionmaking in *National League of Cities*, *supra*, and such intrusion should not be allowed here either.

ARGUMENT

I. Publicly Owned Mass Transit Systems Are A Traditional Governmental Function

A. Introduction

In prior cases this Court has said a three-pronged test must be satisfied before a state or local activity is protected by the Tenth Amendment. See, *e.g.*, *Hodel v. Vir-*

ginia Surface Mining and Reclamation Assn., Inc., 452 U.S. 264 (1981). The three prongs are that (1) challenged federal action must regulate the states *qua* states, (2) the federal action must affect a matter which is an indisputable attribute of state sovereignty and (3) the federal action must "directly impair the states' ability to structure integral operations in areas of traditional governmental functions." *Id.* at 287-288.

In addition, the Court has said that even if each of these prongs is met, the state or local interest may still have to submit to federal power if the federal interest is strong enough.

Finally, in explaining the third prong of the foregoing test—the "traditional governmental function" prong—the Court has emphasized that the purpose of this prong is to determine whether the ability of states to fulfill their role in the Union is being impaired. *United Transportation Union v. Long Island Railroad Company*, *supra*, 455 U.S. at 686, 687.

Amici, who represent the governors, state legislators, cities and counties of this nation, have grave reservations as to whether the three-pronged test provides satisfactory criteria for determining whether state and local power is protected under the Tenth Amendment.⁷ However, it is

⁷ The test inherently creates serious intellectual and practical difficulties, and it seems to be extraordinarily hard for state and local power to survive under it. See, e.g., *Equal Employment Opportunity Commission v. Wyoming*, — U.S. —, 103 S. Ct. 1054 (1983); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *United Transportation Union v. Long Island R.R. Co.*, *supra*; *Hodel v. Virginia Surface Mining & Reclamation Assn.*, *supra*; *Dove v. Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (6th Cir. 1983); *Kramer v. Newcastle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, — U.S. —, 103 S. Ct. 786 (1983); *Alswine v. City Council*, *supra*. The test thus results in progressive and vast centralization of power in the federal government, with a concomitant and serious diminution in the governing power of state and local governments. Such centralization and diminution is a result eschewed by the constitutional

unnecessary to deal with this question here. For even if the three-pronged test is applied, publicly owned mass transit systems qualify for immunity from federal wage and hour regulation. In this regard, it is crucial to note that the first two prongs of the test are not even at issue here. Rather, all parties have conceded these two prongs are met: it is conceded that the challenged federal wage and hour regulation is here being applied to states as states and addresses a matter—the wages and hours of government employees—which is an indisputable attribute of state sovereignty.

Concession on these points is well founded. For in *National League of Cities, supra*, this Court already conclusively determined that application of the FLSA to the states and their political subdivisions is a regulation of the “States as States.” 426 U.S. at 845. Equally, the Court determined that the “States’ power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation

plan of federalism, under which power is to be shared among levels of government.

Because of *amici’s* views on this subject, *amici* have and will continue to point out specific weaknesses in each of the three prongs as appropriate cases arise in this Court. See, e.g., *Brief Of The Council of State Governments, The National Conference of State Legislatures, The National Association of Counties, The National League of Cities, The International City Management Association, and The United States Conference of Mayors as Amici Curiae In Support Of a Plenary Hearing and Reversal of the Decision Below, State of Connecticut et al. v. United States of America, et al.*, No. 83-870, O.T. 1983. *Amici* will further urge that a better criterion of state and local power under the Tenth Amendment is whether challenged federal action harms the ability of state and local governments to fulfill their role in the Union. This criterion, of course, was initially presented by the Court in *LIRR, supra*. *Amici* will also urge that an additional criterion of state and local power is whether the state and local interest is heavily outweighed by the federal interest because of constitutional or practical reasons. Here again, the advocated measure of power was initially presented by this Court, this time in *Hodel, supra*.

will be provided where these employees may be called upon to work overtime," are "undoubted attribute[s] of state sovereignty." *Ibid.*

Thus, the only question in this case under the three-pronged test is whether publicly owned mass transit is a traditional governmental function, a question we address below. Additional questions are whether imposition of the FLSA will harm the ability of local governments to effectively carry out their role in the Union, and whether the federal interest in applying the FLSA here is so strong that it necessitates submission of the local governments' interests. These questions, too, are addressed below.

B. Publicly Owned Mass Transit Systems Are a Type of Function Historically Performed By Local Government

1. In *LIRR, supra*, this Court ruled that "emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions." 455 U.S. at 686. Rather, the purpose was to determine whether a federal regulation will hinder a state "government's ability to fulfill its role in the Union," or will "undermine the role of the states." *Id.* at 686, 687.

Because the traditional governmental function test does not impose a "static historical view," it cannot and does not require that a function be identical to a prior activity of state and local governments. Rather, it demands only that an activity be of the same genre or type as those previously performed by such governments. An activity is of the same genre or type if it serves the same purposes and policies as prior activities.

Were the test to require more than this—were it to require identity of activities—the concept of traditional governmental function would be static and frozen as of a prior date in history. To the vast detriment of themselves

and their citizens, state and local governments would be unprotected against intrusive federal action if they altered their activities or adopted new methods and techniques to meet the changing needs of citizens. Though technology, demographics, economic facts and other relevant factors were altered, the protected functions of state and local governments could not change. The effectiveness of the governing power of state and local governments would progressively diminish, and the power of the federal government would progressively increase. Contrary to our constitutional plan of federalism, power would ever-increasingly be centralized in the national government.

None of this is an idle or academic problem. Rather, the problem is a crucial one. For state and local governments have often had to begin providing new services needed by citizens because of changes in technological, demographic and economic facts. Over time such new services have already included public schools, hospitals, fire departments, sanitation facilities, mass transit, airports, and other necessities of modern life. And there can be no telling what new services might be needed in the future.

If they are to fulfill their constitutional and governmental roles, state and local governments must be free to perform new activities and adopt new methods as circumstances require, free of debilitating federal action. We thus reiterate our central point: The traditional governmental function test does not require that a state or local activity be identical to prior ones. At most, it demands only that an activity be of the same genre or type as ones previously performed by state or local governments.

2. The provision of mass transit is of a genre traditionally performed by state and local governments. Traditionally, these governments have provided citizens with essential infrastructure public services which cannot be or are not being provided by private enterprise, *e.g.*, police and fire protection, roads, and sewage treatment

plants. Indeed, there are essential services which this Court has acknowledged to be traditional governmental functions even though they are provided by private enterprise as well as by government, *e.g.*, schools and health facilities. *National League of Cities, supra*, at 851. Also, as this Court expressly took pains to point out just last term in *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories*, — U.S. —, 103 S.Ct. 1011, 1047 n.7 (1983), the provision of services required by the needy "is a traditional concern of state and local governments."

Under these criteria, mass transit is the type of function historically performed by local governments. Local mass transit systems are a vital infrastructure service. Publicly owned systems came into existence because private companies could no longer provide this essential service, but its continuation was crucial to vast numbers of citizens and to the economic and environmental health of urban areas. The extent of the total transit service provided by publicly owned systems quickly grew to overwhelming proportions—to far greater proportions than the service provided by acknowledged traditional governmental functions such as publicly owned hospitals and universities. Because they provide an overwhelming percentage of the service, publicly owned transit systems have no competition from private companies in most areas and very little in others.⁸ And publicly owned

⁸ The Department of Transportation directory of urban transit systems lists SAMTA's only competition as two vehicles belonging to Trailways, Inc. *DOT Directory, supra* at 8, R. 457.

In his brief, appellant Garcia argues that holding mass transit to be a traditional governmental function will give such transit an advantage that will stifle competition in transit services and will encourage governments to take over other businesses. The argument is contrary to facts, highly speculative, and simply wrong.

In the mass transit field there is very little if any competition from private companies. See generally, *DOT Directory, supra*. Indeed, publicly owned transit arose precisely because private companies no longer wished to be in the field. Nor will a decision favorable to publicly owned mass transit encourage governments to

mass transit systems predominantly serve the needs of less affluent and otherwise needy members of society. For these reasons, publicly owned mass transit is a paradigm of the type of activity traditionally engaged in by state and local governments.

Indeed, it is appropriate to go further. Because mass transit is an activity in which local governments have now been heavily engaged for at least twenty years, it not only is the *type* of activity traditionally performed by these governments, it is an activity traditionally performed by them.⁹

3. There are several additional reasons why publicly owned mass transit carries out longstanding purposes and policies of local governments, and at minimum is the type of function traditionally performed by them:

a. Because they are crucially concerned with ensuring an adequate local transportation infrastructure, state and local governments have facilitated the public's need for transportation "from time immemorial." See *Molina Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841, 845 (1st Cir. 1982). Prior to owning mass transit systems, these governments aided the transportation infrastructure by building and maintaining roads. This previously was a sufficient involvement, but such a limited role is no longer practical. For private transit com-

take over businesses which are largely and satisfactorily private. Not only is there a complete absence of data to suggest such a result, but factors which now make mass transit a governmental function would not exist in such cases. Finally, as shown by the existence of private schools, private hospitals, private garbage collectors, and even private fire departments, when a field is one in which economic and technological conditions make it intrinsically possible to earn a profit, private companies can exist and thrive even though government bears responsibility for providing a basic service.

⁹ Indeed, a number of large and small cities have been heavily engaged in providing mass transit services for much longer than the last twenty years. And more recently, of course, mass transit has been not just heavily but overwhelmingly provided by local governments.

panies have gone out of business as metropolitan areas expanded and costs skyrocketed. Nor can enough highways be built to carry people in private automobiles. There is insufficient land for such construction, to say nothing of funds. Moreover, even if enough new roads could be developed, they would be of little benefit to the "transit-captive," who lack access to private cars. Thus, public mass transit is the only feasible alternative for many American citizens. It is essential to the existence of the modern city, and enables a local government to meet the public's basic transportation needs.

b. Mass transit also furthers other traditional governmental functions. For example, many of SAMTA's riders are persons for whom the government would have to provide substitute services if there were no public transit system. Millions of riders in 1978 and 1979 were students of the Bexar County and Fr. Sam Houston Independent School Districts on their way to school. *Cook Affidavit, supra*, at ¶ 8, R. 199. If there were no public transit system, these school districts would have to hire additional drivers and buses to provide transportation. Another large class of riders is the elderly, *id.* at ¶ 9, R. 200, who have limited mobility. If it had no mass transit system, San Antonio would have to provide them with meals on wheels programs when food shopping becomes too difficult and medicab programs when transportation to doctors and public health centers becomes otherwise unavailable.

The substitute services which San Antonio would have to provide for school children and the elderly would be traditional governmental functions under the local government's power to provide schools and to promote the public health and welfare. Since it serves the same purposes and policies as such traditional functions, a centralized public mass transit system serving the city's school, health and welfare goals, as well as other governmental goals, should itself be considered a traditional governmental function.

Finally, most peak hour riders are commuting to and from work. There is a strong governmental interest in making it possible for members of the work force to get to their places of employment. This interest is kin to the longstanding state and local interest in promoting local employment and the local economy by such measures as tax abatements to industry for locating in an area.

c. Publicly owned mass transit is intended to serve the public good, not pecuniary gain. Like other traditional governmental functions, and unlike private business, it is not a commercial enterprise and does not make money. Indeed, the federal government estimates that, by 1985, annual deficits for public mass transit could reach as high as \$4.6 billion. *Financing Transit, supra*, at 19.

Rather than being a commercial enterprise, mass transit fills a public need that the private sector no longer can fill—universal transportation services at a low price. No one but SAMTA, for example, would provide the efficient, free El Centro downtown bus service for shoppers and office workers, as well as special services at greatly reduced fares for the elderly.

C. The Long Island Railroad Case Provides No Support for Appellants

Though provision of mass transit is the *type* of function traditionally performed by state and local entities, and at least during the last twenty years has *been* a function traditionally performed by local governments, appellants claim it cannot meet the traditional function test. Relying on *LIRR, supra*, they say that “primacy” must be given to history, *Brief for the Secretary of Labor*, p. 25, and that historically mass transit systems were owned by private companies.

LIRR does not support defendants, however. To begin with, it rejected a static historical test. But that is precisely the kind of test defendants seek to apply. For in seeking to give “primacy” to history, appellants overlook the history of the last twenty years, during which mass

transit became so overwhelmingly supplied by governments rather than private companies that by 1980 publicly owned systems accounted for 94 percent of all riders, 93 percent of total vehicle miles, and 90 percent of total transit vehicles. Unless history must be frozen as of the start of the Johnson administration in 1963, the historical record of the last two decades belies appellants' claim that the "primacy" of history demands judgment for them.¹⁰

The historical record of the last two decades also undercuts defendants' effort to find a factual similarity between this case and *LIRR*. For when it said in *LIRR* that "[o]peration of passenger railroads" such as the commuter line involved there "has traditionally been a function of private industry, not state or local governments," the Court immediately added the rather pertinent fact that "[a]t the time of this suit, there were 17 commuter railroads in the United States; only two of those railroads were publicly owned and operated, both by the Metropolitan Transportation Authority." *United Transportation Union v. Long Island R.R. Co.*, *supra*, 455 U.S. at 686, 686 n.12. A situation in which only 2 of 17 commuter lines were owned by a public entity is worlds apart from one in which public entities all across the nation now provide over 90 percent of the service.

Finally, there also is another highly important distinction between this case and *LIRR*. In *LIRR* the Court pointed out at length that railroads had been "subject to pervasive federal regulation" under the Interstate

¹⁰ Though the Secretary of Labor argues for the "primacy" of history, even he is forced to concede that a new technological development can create a protected governmental function. *Brief for the Secretary of Labor*, at 25. However, he denies that new economic or demographic developments can create the same status, at least not where a technology was initially employed by private enterprise. The Secretary's position lacks any sensible basis. As mass transit exemplifies, changes in demographic and economic facts can require government to undertake a function just as surely as technological change.

Commerce Act "for nearly a century," and that federal regulation of railroad labor relations had begun only one year after the Interstate Commerce Act was passed. *United Transportation Union v. Long Island R.R. Co.*, *supra*, 455 U.S. at 687-688. The Court felt this uniform and long-standing federal regulation of railway matters was essential to the rail system and the national economy, which could be greatly harmed by crippling rail strikes if federal law were inapplicable. Because of this view, the Court was greatly concerned lest there be nationally harmful erosion of the broad and historic federal regulatory authority over railroad operations in general and railway labor relations in particular. *Id.* at 688-689.

But no comparable situation exists here. There has been no pervasive overall federal regulation of mass transit—regulation of transit was instead supplied by state and local governments. As well, the federal effort to regulate the wages and hours of transit operators is only of recent vintage, as shown by appellants' own briefs, and is not critical to the health of the economy. Thus, there will be no improper erosion of federal regulation here nor any danger to the national economic system.¹¹

II. Application of the FLSA to Publicly Owned Mass Transit Would Harm the Ability of Local Governments to Fulfill Their Role and Is Not Justified By Any Federal Interest

Application of the FLSA to publicly owned transit systems would harm the ability of local governments to fulfill their governmental role of providing mass transit services. Nor does the federal government have an interest in application of the FLSA that would outweigh, and

¹¹ Any supposed danger to the national economy stemming from lack of federal control over transit operators is further belied because *National League of Cities* has already exempted far larger numbers of state and local employees from federal wage and hour regulation. Appellants have not and could not validly claim this harmed the national economy.

justify submission of, the local governments' interests. To the contrary, the interests of the local governments greatly outweigh the federal interest.

In *National League of Cities, supra*, this Court ruled that the FLSA could not be applied to the sovereign functions of state and local governments lest their ability to perform these functions be impaired. Under this holding, applicable here, the interest of the federal government in applying the FLSA is outweighed by the interest of state and local governments in connection with crucial state and local activities.

Beyond this, the imposition of the wage and hour provisions of the FLSA would dramatically increase the costs of labor-intensive mass transit. It would thereby increase the losses suffered by governmental entities in providing this service—a service which already is heavily subsidized because it already loses large amounts of money. The increased costs and losses would adversely affect the ability of governmental systems to adequately provide services essential to scores of millions of citizens. It is of great consequence that such potential for increased costs, and the consequent adverse effect upon necessary services, was an important reason why this Court struck down the federal government's attempt to impose the FLSA upon state and local activities in *National League of Cities, supra*, 426 U.S. at 846-48.

The FLSA would also impair the ability of transit systems to schedule work in a way that meets the needs of citizens. Because of rush-hour commuting patterns, public transit systems must develop innovative work schedules that balance the need for an efficient transportation system with the workers' right to fair wages and fair working hours. This is accomplished by split shifts, under which workers receive premium rates of pay because they have breaks between their operating hours.¹²

¹² Split shift working schemes can also serve a secondary purpose of helping the public transit system include a variety of workers on

If the wage and hour provisions of the FLSA are imposed on mass transit services, local governments may have to abandon the split shift scheme, as the costs could become too high. Here again it is of great consequence that the possibility that innovative or flexible working schemes would be stifled was a major reason this Court struck down the application of the FLSA to state and local entities in *National League of Cities*. 426 U.S. at 850.

Moreover, the potential stifling of innovative or flexible schedules implicates another broad state and local interest, the interest in being free to experiment. This right is crucial to improving the efficiency of state services and its exercise is in the interest of the federal government as well as state and local governments. In the words of Justice Brandeis:

There must be power in the states and the nation to remould through experimentation, our economic practices and institutions to meet changing social and economic needs.

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also *Zobel v. Williams*, 457 U.S. 55, —, 102 S. Ct. 2309, 2321 (1982) (O'Connor, J., concurring); *Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980).

the payroll: certain classes of workers may find it difficult to spend long uninterrupted stretches away from home or personal obligations.

As against these important local interests, there is little to balance on the federal side. The only federal interest expressed in the FLSA is a commendable desire to assure that workers receive at least the minimum wage and fair working hours. But public transit workers receive wages three times as high as the minimum prescribed by the FLSA, and their wages are comparable with those of other city employees, construction workers, manufacturing workers, and workers in the building and printing trades. As well, they are already paid premium rates for a significant portion of their normal working hours. The working hours themselves are arranged to provide fair hours while meeting the exigencies of transit service. Finally, unlike workers for whom the FLSA is basically designed, the employees of public mass transit systems occupy a strategic bargaining position which ensures them of fair wages and hours.¹³

Nor need there be any fear that holding the FLSA inapplicable to publicly owned mass transit will result in federal regulatory power being diminished in connection with subjects on which it should prevail. There will still be many subjects where, for constitutional and practical reasons, federal power will be sustained, whether it is applied to mass transit or other state and local activities. The Constitution, for example, forbids racial and religious discrimination. No state or local government can evade this prohibition on Tenth Amendment grounds. Similarly, acting pursuant to its constitutional powers, Congress can mandate state and local compliance with laws banning discrimination by age or sex. See, *Equal Employment Opportunity Commission v. Wyoming*, — U.S. —, 103 S. Ct. 1054 (1983). Also, because uniform national minimums are requisite to successful efforts to stop nationally harmful air and water pollution

¹³ As stated by this Court in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706 (1945), the FLSA was enacted because, due to "unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation" regarding minimum wages and maximum hours.

and nationally harmful wastes of energy, Congress can constitutionally require adherence to laws establishing minimum antipollution standards and preventing wastes of precious energy resources. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*; *Federal Energy Regulatory Commission v. Mississippi*, *supra*. Thus, on these and other appropriate subjects, federal power will continue to be maintained.

III. Because of Important Constitutional Principles, Federal Funds Provided Under the UMTA Cannot Justify the Imposition of the FLSA Upon Publicly Owned Mass Transit Systems

Appellants urge that publicly owned mass transit systems should not qualify for Tenth Amendment protection because local governments used UMTA funds in acquiring or operating transit systems, and especially urge that the use of such funds to acquire systems should distinguish mass transit from other fields. Appellants' argument is erroneous for crucial constitutional reasons.

First, this Court has ruled that if Congress intends to impose conditions upon federal grants, it must state the conditions unambiguously, so that state and local governments will know the obligations they are assuming and can judge whether they nonetheless wish to accept the grants. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). This precept is violated by appellant's argument. The UMTA does not condition its grant monies upon compliance with the wage and hour provisions of the FLSA. To the contrary, in passing the UMTA "Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local government entities and transit workers." *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, — U.S. —, 102 S.Ct. 2202, 2209 (1982) (emphasis supplied).¹⁴

¹⁴ The only provision of the UMTA which had any effect at all on labor relations was Section 13(c), 49 U.S.C. § 1609(c), which con-

Moreover, San Antonio acquired its transit system without the use of UMTA monies and before that act was even passed.

Second, and of even greater importance, appellants' argument will gravely impair the federal nature of our system. In claiming that the wage and hour provisions of the FLSA are applicable to publicly owned transit systems because local governments have used UMTA funds, appellants are relying on federal funding to justify displacement of state and local authority on a subject vital to state and local governments. Such a position is commonly asserted by the national government,¹⁵ but its argument will vitiate the federal system. For the national government has a financial power vastly superior to that of state and local governments: it has an infinitely greater ability to raise money through taxation and borrowing. Because of its superior financial power, the national government grants over \$80 billion annually to state and local governments; such funds are important in enabling state and local governments to fully carry out their essential sovereign functions. The granted funds are used in such crucial fields as health, education, safety, police protection and roads. They are used both for operating costs and to acquire essential capital facilities—*e.g.*, roads, schools, hospitals and public buildings. Without the funds, state and local governments would be gravely hampered in performing their sovereign duties effectively. This is no less true in regard to funds used to acquire vital facilities than in regard to funds used to operate state and local functions.

ditions federal grants upon recognition of employees' collective bargaining rights. The inclusion of this specific condition highlights the absence of any provision under which application of the FLSA is a condition of grant monies.

¹⁵ See *e.g.*, *Brief for Appellees, State of Connecticut, et al. v. United States, et al.*, No. 83-6159 (2d Cir. 1983), jurisdictional statement pending, No. 83-870, O. T. 1983.

Thus, if the grant of funds enables the national government to establish governing conditions in areas the Constitution otherwise commits to state and local governments, then national power will be aggrandized and state and local authority will be diminished across a broad range of critical state and local activities. Instead of power being divided among levels of government, as the Constitution contemplates, it will be centralized in the national government, as the Constitution eschews.¹⁶ Huge federal grants for such functions as police protection, health services and park restoration did not deter this Court from precluding federal intrusion into these areas of state and local decisionmaking in *National League of Cities*, *supra*. Likewise, the fact of federal grants should not sanction federal intrusion upon state and local decisionmaking in other areas which are constitutionally committed to state and local governments.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below that publicly owned mass transit systems are protected by the Tenth Amendment against application of the FLSA.

Respectfully submitted,

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¹⁶ This will occur though federal grant monies, while crucial to the ability of state and local governments to fully carry out their functions, are nonetheless far below the amount of their own funds spent on vital functions by state and local governments. See, Madden, *The Constitutional Foundations of Federal Grants*, in *Federal Grant Law* 5, 6 n.3 (M. Mason, ed. 1982).

No. 82-1913-ADX
Status: GRANTED

Title: Joe G. Garcia, Appellant
v.
San Antonio Metropolitan Transit Authority, et al.

Docketed:
May 26, 1983

Court: United States District Court for the
Western District of Texas

Vide:
82-1951
See also:

Counsel for appellant: Gold, Laurence, Solicitor General
Counsel for appellee: Parker Jr., George P., Coleman
Jr., William T.

Entry	Date	Note	Proceedings and Orders
1	May 4 1983		Application for extension of time to docket appeal and order granting same until June 1, 1983 (White, May 5, 1983).
2	May 26 1983	G	Statement as to jurisdiction filed.
4	Jun 13 1983		Order extending time to file response to jurisdictional statement until August 19, 1983.
6	Jun 21 1983		Order extending time to file response to jurisdictional statement until July 26, 1983.
7	Jul 8 1983		Brief amicus curiae of Natl. League of Cities, et al. filed. VIDE.
8	Aug 19 1983		Motion of appellee San Antonio MTA to affirm filed. VIDE.
9	Aug 19 1983		Motion of appellee Am. Public Transit Assn. to affirm filed. VIDE.
10	Aug 24 1983		DISTRIBUTED. September 26, 1983
12	Aug 30 1983	X	Reply brief of appellant Joe G. Garcia filed.
13	Oct 3 1983		PROBABLE JURISDICTION NOTED. The case is consolidated with 82-1951 and a total of one hour is allotted for oral argument. *****
15	Nov 15 1983		Order extending time to file brief of appellant on the merits until November 28, 1983.
16	Nov 15 1983	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
17	Nov 28 1983		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
18	Nov 28 1983		Brief of appellant Joe G. Garcia filed. VIDE.
19	Nov 29 1983		Application to exceed page limits on appellant's brief on the merits filed with BRW (A-411).
20	Nov 29 1983		Order granting same not to exceed 52 pages by White, J.
21	Dec 5 1983		Brief of appellant Donovan, Sec. of Labor in 82-1951 filed. VIDE.
23	Dec 13 1983	D	Motion of appellees for divided argument filed.
25	Dec 19 1983		Order extending time to file brief of appellee on the merits until February 3, 1984.
26	Dec 28 1983	N	Motion of National Institute of Municipal Law Officers for leave to file a brief as amicus curiae filed.
27	Jan 3 1984		Record filed.
28	Jan 3 1984		Certified original record, 2 boxes, received.
29	Jan 9 1984		Motion of appellees for divided argument DENIED.
30	Dec 28 1983		Brief amicus curiae of National Institute of Municipal Law Officers filed. VIDE.

Entry	Date	Note	Proceedings and Orders
31	Feb 3 1984	Brief of appellee Am. Public Transit Assn. filed.	VIDED.
32	Feb 3 1984	Brief of appellee San Antonio MTA filed.	VIDED.
33	Feb 3 1984	Brief amicus curiae of Legal Foundation of America filed.	VIDED.
34	Feb 3 1984	Brief amicus curiae of Natl. League of Cities, et al. filed.	VIDED.
35	Feb 1 1984	Leave to exceed pages on amicus brief of Nat'l. League of Cities, et al. filed with BRW (A-616).	
36	Feb 3 1984	Order granting leave to file amici curiae brief in excess of page limitations, not to exceed 33 pages.	
37	Feb 14 1984	SET FOR ARGUMENT. Monday, March 19, 1984. (1st case). This case is consolidate with No. 82-1951) (1 hour)	
38	Feb 15 1984	CIRCULATED.	
39	Mar 12 1984	X Reply brief of appellant Joe G. Garcia filed.	VIDED.
40	Mar 12 1984	X Reply brief of appellant Donovan, Sec. of Labor filed.	VIDED.
41	Mar 19 1984	ARGUED.	